

Selected Documents from Claim File

Claim No. LRF-2002-0226-01

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL
LICENSING OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN)
RECOVERY FUND CLAIM OF) Hearing August 14, 2002
ANDERSON LUMBER COMPANY)
REGARDING THE CONSTRUCTION)
BY KORY LEE DEVENISH DBA) Claim No.: LRF-2002-0226-01
DEVENISH CONSTRUCTION ON)
THE RESIDENCE OF FRUCTUOSO)
& MIRTA DIAZ 335 WOODLAND)
HILLS DRIVE, WOODLAND)
HILLS, UT., 84653)

Be it remembered that on the 14th day of August,
2002, the hearing in the above-named action now pending in
the above-named court, was taken before Heather White, a
certified shorthand reporter and notary public in and for
the State of Utah, commencing at the hour of 10:07 a.m. of
said day at the Heber M. Wells Building, 160 East 300
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State of Utah.

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A P P E A R A N C E S

For The Claimant: Clair Jaussi, Esq.

For The Division: Tony R. Patterson, Esq.

RESIDENCE LIEN RECOVERY FUND BOARD

Clint Techmeyer (Chair)

Steve Bankhead

Jorge Dennis

J. Clair Cantwell

1 WEDNESDAY; AUGUST 14, 2002

2
3 P R O C E E D I N G S
4

5 THE COURT: This is the time and place set for
6 hearing in the matter of the Lien Recovery Fund claim of
7 Anderson Lumber Company regarding the construction by Kory
8 Lee Devenish doing business as Devenish Construction on the
9 residence of Fructuoso and Mirta Diaz, 335 Woodland Hills
10 Drive, Woodland Hills, Utah 84653. Case number
11 LRF-2002-0226-01. This matter comes on hearing before the
12 Residence Lien Recovery Fund advisory board. The claimant
13 in this proceeding, Anderson Lumber, is represented by
14 Counsel Clair Jaussi. The Lien Recovery Fund is
15 represented by Tony R. Patterson. There are four members
16 of the advisory board present for the hearing today. The
17 chair of the board, Clint Techmeyer, Steven Bankhead, Jorge
18 Dennis, and James Clair Cantwell. And J. Craig Jackson,
19 the director of the Division of Occupational and
20 Professional Licensing is also present.

21 Prior to commencement of the hearing, the Court
22 has conducted a brief prehearing conference with respective
23 counsel. Mr. Jaussi, do you have an opening statement?

24 MR. JAUSSI: Yes, I do, Your Honor. May I work
25 from the seat?

1 THE COURT: That's fine.

2 MR. JAUSSEI: Thank you. Really today I don't
3 think there's going to be very much in dispute factually.
4 I think this is really a question of what is the law and
5 how is the law going to be interpreted. And we have some
6 very different approaches, I believe, from the Division in
7 the way that the law should be interpreted.

8 As I understand it, there are really two main
9 issues that the Division has taken with this claim. The
10 first, they've taken the position that the lawsuit wasn't
11 commenced within 180 days of the last delivery of materials
12 by Anderson Lumber Company. Perhaps I can characterize
13 that. As I understand it, what they're really saying,
14 because there's no question the lawsuit was commenced
15 within 180 days of the last delivery, that is, the
16 complaint was filed within 180 days of the last delivery of
17 the Anderson Lumber materials, but the complaint was filed
18 against Kory Lee Devenish and his wife Tina Devenish, and
19 of course the homeowners, the Diazes.

20 During the course of the hearings as this
21 progressed, it became evident and apparent that Kory had a
22 twin brother named Kelly, and that Kelly was the person who
23 was licensed. And so Anderson Lumber, I think it was even
24 after the judgment had been granted, attempted to amend the
25 complaint and bring in Kory, the licensed contractor. The

1 problem is, Kory had declared bankruptcy like a year
2 before. And so I think what the Division is saying is that
3 the complaint against Kelly, the licensed contractor,
4 wasn't commenced within the 180 days.

5 Anderson Lumber's position is simply this, that's
6 not a requirement of the law. The contract between
7 Anderson Lumber and the person Anderson Lumber supplied the
8 materials to is a contract between Anderson Lumber and
9 Kelly, now deceased. We supplied the qualified services to
10 Kelly Devenish, we got a judgment against the estate of
11 Kelly Devenish, and against his widow. We brought her in
12 on a supplemental order. There is no asset in the estate.
13 We were unable to discover any assets, as an unemployed,
14 stay-at-home widow who's basically got nothing worth
15 taking. And that's the first issue.

16 And, of course, the second issue is really the
17 meat of this. And that is, did the homeowners enter into a
18 written contract with a licensed contractor? Our position
19 is that they simply did. Because if you'll look at the
20 contract, it says Devenish Construction, and then you've
21 got Kelly's and Kory's name underneath it. There's an
22 affidavit, which is going to be presented to you, that
23 Kelly signed saying, Kory had authority to contract for me.
24 And this whole issue of, was it a partnership, was it not a
25 partnership. The fact is, our position is that that

1 contract was entered into between Devenish Construction and
2 the Diazes, because Kory had authority to contract for
3 Kelly. And that's what the affidavit says.

4 MR. PATTERSON: Just a couple of preliminary
5 matters if I may, Your Honor.

6 THE COURT: Mr. Patterson, go ahead.

7 MR. PATTERSON: Thank you. First of all, I would
8 like to approach the bench and present a number of
9 documents that it's my understanding will be stipulated to
10 as exhibits in this matter; is that correct, Mr. Jaussi?

11 MR. JAUSSEI: That's correct, Your Honor.

12 MR. PATTERSON: I have given a copy to Mr.
13 Jaussi. We briefly went through them. And I will be
14 referring to them in the future. Also, I have a copy of
15 the Utah Construction Trades Licensing Act Rules, and the
16 act itself. And in addition to that packet, which has not
17 been marked as exhibits, I would like to add two more,
18 which are certificates of custodian of records. They would
19 be marked, first of all, the certificate of custodian of
20 record that is regarding Devenish Construction Incorporated
21 as State's Exhibit 18.

22 THE COURT: You've already given me 18, would it
23 be 19?

24 MR. PATTERSON: Correct. Thank you, Your Honor.
25 And then the certificate of custodian of records regarding

1 Kelly W. Devenish doing business as Kelly W. Devenish
2 Construction as State's Exhibit 20.

3 THE COURT: Have you provided these certificates
4 to Mr. Jaussi?

5 MR. JAUSSEI: I have them, Your Honor. And I have
6 no objection.

7 THE COURT: As identified, Exhibits 1 through 20
8 are received. Do you have copies for the board, Mr.
9 Patterson?

10 MR. PATTERSON: I do, Your Honor. Let me
11 approach the bench with 19 and 20.

12 THE COURT: Thank you.

13 MR. PATTERSON: Because of the stipulation, I
14 have a spare set that the board could review, that I could
15 present to them, if that would be acceptable.

16 THE COURT: They've been received, that's fine.

17 MR. PATTERSON: And then finally, Your Honor, I
18 don't believe we have the original contract that the
19 parties are relying upon. And it would perhaps be
20 beneficial to have that included with the record as State's
21 Exhibit 21.

22 MR. JAUSSEI: I agree, Your Honor, absolutely.

23 THE COURT: As identified, it will be received.

24 MR. JAUSSEI: Tony, have you got a copy of that
25 for me? Let's make sure it's the same one.

1 MR. PATTERSON: If I may approach the board and
2 present them with a copy as well?

3 THE COURT: That's fine.

4 MR. PATTERSON: And perhaps a few facts will be
5 beneficial, Your Honor. Your Honor, it's the Division's
6 position that this is an example of the type of case where
7 the homeowner is not entitled to the protection under the
8 act, because they failed to enter into a written contract
9 with a licensed contractor. The Division believes that in
10 a review of the exhibits that have been presented, it will
11 reflect that the contract was signed by the homeowner, that
12 was signed by Kory Devenish. Kory, by the way, is the
13 unlicensed brother, not the licensed brother. Kory never
14 held a license with the State of Utah until after the work
15 on the home, until after he had finished his work on the
16 home. He then obtained a license under the name of
17 Devenish Construction Incorporated, but at the time he was
18 not licensed. The brother, Kelly Devenish, that was
19 licensed, held a license issued to him by DOPL as a sole
20 proprietor with no employees. That license could not be
21 lent to a partnership, to a corporation, or to any other
22 entity.

23 In the packet, there is an affidavit from Kelly
24 Devenish that was admitted at the hearing of this matter.
25 And the Division argues that it was, in fact, a partnership

1 as stated between Kelly and Kory, as stated in that
2 affidavit, and was relied upon by the Court in its
3 decision.

4 The Division is arguing that because the
5 homeowner did not make the, or was not entitled to the
6 protection under the act, then the claimant is not entitled
7 to recovery under the fund. Because under the law, as a
8 condition of recovery from the fund, they first must
9 establish that the homeowner is entitled to protection
10 under the act. And that factually cannot happen, because
11 there is no licensed entity.

12 Further, that because it was a partnership
13 entity, that it was necessary to have the partnership sued,
14 to have service upon one or both partners as agent for the
15 partnership, which that never occurred. However, after
16 judgment was entered a couple of months later, there was an
17 attempt at that point to amend the complaint, the complaint
18 was amended. That amended complaint was served upon Kelly
19 Devenish. Kelly Devenish then presented evidence of his
20 bankruptcy that had been filed nearly a year prior to that
21 time.

22 And so the Division believes that because the
23 homeowner is not entitled to the protection of the act,
24 that the claimant is not entitled to payment under the act.

25 THE COURT: Mr. Jaussi, I think in your opening

1 statement you indicated you didn't believe there was a
2 great deal of any factual dispute as to this claim.
3 Believing that to be the case based on your representation,
4 are there any witnesses that you're going to offer today,
5 or is it simply a matter of argument?

6 MR. JAUSSEI: For us it's simply a matter of
7 argument, Your Honor. We do have one affidavit which is
8 unsigned, and so I'm not going to try to enter that as
9 evidence. But I'm going to ask Your Honor if you will hold
10 the record open until we can obtain a notarized signed
11 affidavit and then present that as a late filed exhibit.

12 THE COURT: What is the purpose of it?

13 MR. JAUSSEI: It is another affidavit from Kelly
14 Devenish, which basically refines his first affidavit. The
15 salient point being that his twin brother, Kory, had full
16 authority to contract for him.

17 THE COURT: Mr. Patterson, I understand in our
18 prehearing conference you explained that the Division would
19 object to any receipt of the affidavit if not signed. If I
20 were to grant a leave for ten days, to allow Mr. Jaussi to
21 obtain a signed affidavit, would the Division object to its
22 receipt in this record?

23 MR. PATTERSON: I would, Your Honor. I've not
24 had an opportunity to review the affidavit. I believe that
25 this is inconsistent with the first affidavit that was

1 relied upon by the parties in the District Court. And
2 without having Mr. Kelly Devenish here to testify and to
3 explain the differences, that it would be inappropriate to
4 have this affidavit admitted.

5 THE COURT: If it's agreeable with Counsel, what
6 I'll do under those circumstances is, still leave the
7 record open for ten days, give counsel the opportunity to
8 review the affidavit against the earlier one. If you still
9 have an objection, I'll address the objection in a
10 subsequent phone conference with Counsel. And if the
11 objection is sustained, then the record will be closed; if
12 the objection is overruled, then I will certainly expect
13 Mr. Jaussi to be able to submit the affidavit. Is that
14 agreeable?

15 MR. PATTERSON: Your Honor, the Division would
16 object without having the opportunity to cross-examine Mr.
17 Devenish based upon the representations in this affidavit.

18 MR. JAUSSI: Your Honor, in that event, we would
19 move to, in that event, we would move to continue this
20 hearing so that we can subpoena Mr. Devenish and have him
21 there.

22 THE COURT: Any objection to the request for
23 continuance, Mr. Patterson?

24 MR. JAUSSI: Your Honor, may I clarify that I'm
25 not moving to continue this hearing, I'm saying that --

1 THE COURT: You'll ask for a supplemental hearing
2 to present him as a witness.

3 MR. JAUSSEI: That's correct, Your Honor.

4 THE COURT: I guess the question I have for
5 Counsel is this, before considering that request, if
6 there's a threshold legal issue that needs to be addressed
7 and can be addressed by the board without his testimony,
8 can that proceed before a decision is made whether to have
9 a supplemental hearing?

10 MR. JAUSSEI: I think it can, Your Honor.

11 THE COURT: Mr. Patterson?

12 MR. PATTERSON: Your Honor, I believe that if the
13 evidence that was relied upon in the District Court was
14 adequate for the parties at that time, it should be
15 adequate for the claimant at this time. And so therefore,
16 there would be no need to continue the hearing to question
17 Mr. Devenish, unless he, in fact, is going to make
18 statements which the Division believes are inconsistent.

19 THE COURT: Mr. Jaussei, if the threshold legal
20 issue or issues can be submitted to the board today through
21 argument of Counsel, and have the board address those
22 issues, would it be appropriate then to let that proceed
23 and then determine based on that outcome whether a
24 supplemental hearing is necessary?

25 MR. JAUSSEI: I think it would be, Your Honor.

1 THE COURT: We'll address it in that fashion, Mr.
2 Patterson, if that's all right.

3 MR. PATTERSON: Your Honor, I'm a little confused
4 with that. Are we saying then we're going to leave open
5 the hearing depending upon whether or not the claimant
6 likes the outcome of the hearing today?

7 THE COURT: No, what I'm indicating is, is that
8 the parties will have the opportunity to present the legal
9 argument to the board today. The board will deliberate
10 that argument and make a recommendation based on the
11 argument. If the board determines that there is a legal
12 bar to this claim, with or without the testimony of Mr.
13 Devenish, that will be the end of things as far as the
14 board is concerned. There won't be a supplemental hearing.
15 If the legal issue is resolved in favor of the claimant and
16 it still requires further testimony from Mr. Devenish to
17 establish the factual basis for the claim, then a
18 supplemental hearing might be conducted. That's how I'm
19 hearing this, Mr. Jaussi, is that your intention?

20 MR. JAUSSEI: Yes, Your Honor.

21 THE COURT: Mr. Patterson?

22 MR. PATTERSON: So it's the board's decision?

23 THE COURT: It's the board's decision whether
24 this claim is barred as a matter of law. And if they
25 determine it is barred as a matter of law and make a

1 recommendation to that effect to the Division, then there
2 wouldn't be a need for the supplemental hearing.

3 MR. PATTERSON: With that we agree to proceed.

4 THE COURT: We'll address it along those lines
5 then. And we'll simply await the board's recommendation,
6 which will be made as quickly, as appropriately, as soon as
7 possible, and then determine if the need for a supplemental
8 hearing arises.

9 Mr. Patterson, I understand in our prehearing
10 conference that there was a tape of a District Court
11 proceeding you wanted to play for the board.

12 MR. PATTERSON: That is correct, Your Honor.

13 THE COURT: If you'd like to do that now. And
14 I'll instruct the court reporter that the tape will be
15 received in evidence after it's been played during this
16 hearing. It will not be necessary for the reporter to make
17 a record of whatever audio content of the tape exists.

18 THE COURT: Off the record.

19 MR. PATTERSON: By way of explaining to the board
20 what this tape is, in the packet of exhibits that you have
21 received, there is a docket from the District Court which
22 heard this particular hearing. This hearing and that case
23 is the underlying action that Anderson Lumber filed against
24 the homeowners and against one of the non-paying parties,
25 Kory Devenish. Let me know if you would like to have the

1 volume turned up.

2 (The tape was exhibited to the board.)

3 THE COURT: Mr. Patterson, having played the
4 videotape, it will be received in evidence. If there's no
5 objection, Mr. Jaussi?

6 MR. JAUSSI: No, that's the tape. I look pretty
7 good on TV; don't I?

8 THE COURT: As Exhibit No. 22. Before taking any
9 further argument from Counsel, just a question to the
10 board, and then open it to the board based on what they've
11 heard to direct any questions to clarify any understandings
12 they may have.

13 First, it is almost 11:00, which board member did
14 we have, Mr. Techmeyer, that might need to leave?

15 MR. TECHMEYER: Mr. Dennis.

16 THE COURT: Mr. Dennis, I don't think we'll be
17 with this much longer, could you bear with us another ten
18 minutes or so?

19 MR. DENNIS: Sure.

20 THE COURT: Thank you. Does the board have any
21 questions for Mr. Jaussi or Mr. Patterson based on their
22 presentation today? Mr. Techmeyer.

23 MR. TECHMEYER: I'm confused by this tape
24 presentation. I was trying to make notes on some of the
25 comments and things that were being made. I wasn't sure

1 who all the players were and who they were representing.

2 THE COURT: Let me see if I can help clarify
3 that. Mr. Patterson, Mr. Noyce was representing the
4 Devenish party; is that correct?

5 MR. PATTERSON: Was representing the estate of
6 Kory Devenish and his wife, Tina Devenish.

7 THE COURT: Mr. Christiansen?

8 MR. PATTERSON: Mr. Christiansen was representing
9 the homeowners, the Diazes. And then Mr. Jaussi
10 representing Anderson.

11 MR. TECHMEYER: The issue, the intent of the
12 issue being argued in here tended to confuse me just a
13 little bit too during part of what was going on there. Mr.
14 Jaussi made a statement that these two may have been
15 operating as a partnership. Have we definitively
16 identified what kind of an operation they were at the time,
17 either if the licenses is under one entity and they're
18 operating as something else, then there's a technicality of
19 the law that has to be answered by statute from this board.
20 And that's -- trying to find out if we've got a fatal flaw
21 that would have to be responded to.

22 MR. PATTERSON: If I may respond, Your Honor.
23 Looking at the written contract that has been admitted as
24 Exhibit 21, you'll notice at the top it says Devenish,
25 right underneath it says Kelly W. Devenish and Kory Lee

1 Devenish. Also, if you would refer to the evidence packet
2 that you received, there is an affidavit in there signed by
3 Kelly Devenish, indicating that they were in a partnership
4 during the time of the construction of the property.

5 Now, one thing to note about that affidavit and
6 where it came from. You'll notice on the hearing, that the
7 judge left the record open for an affidavit and/or a
8 building permit to come in to supplement the record to help
9 address the issue, which the judge saw was a nexus or a
10 connection between Kory and Kelly, and how were they able
11 to use the license. That was the affidavit that was signed
12 I believe on December 5 of that same year. It was
13 submitted to the Court. Based upon that affidavit, the
14 parties, all of the parties in that action -- well, excuse
15 me. There were no objections to that affidavit after it
16 was submitted, therefore, the Court relied upon that
17 affidavit and issued its ruling. And it is the Division's
18 position based upon that affidavit, based upon the parties
19 reliance to it in that action, and based upon other
20 collaborating evidence that is received, that it was a
21 partnership.

22 MR. TECHMEYER: Thank you. I have no other
23 questions, Your Honor.

24 THE COURT: Mr. Bankhead. I'm going to give you
25 the opportunity to respond, Mr. Jaussi, as soon as we get

1 any questions from the board. Mr. Bankhead.

2 MR. BANKHEAD: Looking again at Exhibit 21, aside
3 from the affidavit which was signed, is there any reason
4 why we could not assume that Kory Devenish was acting as an
5 employee or as an agent for Devenish, in this case Kelly
6 Devenish, in the signing of this contract?

7 MR. PATTERSON: The record submitted by Kelly
8 Devenish to the Division reflects that he had no employees.
9 That's attached to his license. When he's making the
10 representation for the foreseeable future, he does not have
11 any employees working under his sole proprietorship, Kelly
12 Devenish Construction.

13 MR. BANKHEAD: Would he necessarily have to
14 change that affidavit in order to hire an employee?

15 MR. WEBSTER: Yes.

16 MR. BANKHEAD: Let's assume that I take out a
17 contractor's license and I think I'm just going to work by
18 myself so I start working by myself and get busy and think,
19 gosh, I need somebody to help me, so I invite somebody to
20 come and work for me. Do I have to notify the Division and
21 change my license?

22 MR. PATTERSON: We're checking the rules on that
23 right quick. Mr. Webster, the program coordinator for the
24 Fund, it's his understanding that that is required by the
25 rules. He's attempting to locate that rule now.

1 MR. BANKHEAD: That's my only question.

2 THE COURT: Mr. Dennis, any questions?

3 MR. DENNIS: No, sir.

4 THE COURT: Mr. Cantwell.

5 MR. CANTWELL: Kelly Devenish, he's the one who
6 had the license, he had it as an individual?

7 MR. PATTERSON: Correct.

8 MR. CANTWELL: And apparently there was a
9 corporation, where does that come into it?

10 MR. PATTERSON: The corporation became licensed
11 after the construction on this particular property. That
12 was applied for by Kory Devenish. What happened is after
13 the, the brothers were doing this part-time company, they
14 had this partnership, they had a falling out, they went
15 their own ways. And Kory Devenish attempted to go out on
16 his own. He received a license, which is in the packet,
17 for the corporation. But that was not until months after
18 the work on the project had stopped.

19 MR. CANTWELL: So this was just an apparent
20 partnership, this was not a formalized partnership?

21 MR. PATTERSON: Part of the record that you have
22 received reflects that the Division of Corporations has no
23 record of the partnership being registered with the
24 Division of Corporations. However, based upon, again, the
25 representations, the affidavit, the practice, the

1 understanding of other individuals, that it was a
2 partnership.

3 THE COURT: Mr. Jaussi?

4 MR. JAUSSEI: If I could just direct your
5 attention to this Exhibit 14, paragraph two. I mean, the
6 biggest problem here is going to be confusion. I mean,
7 it's going to require some very fine thinking to sift
8 through the arguments that we have here. Because I think
9 it becomes very technical.

10 Look at paragraph two, for instance. It's
11 obvious Kelly W. Devenish is doing his best. He's
12 screaming at the top of his lungs, this is my job, my
13 responsibility, I take full responsibility. Look, he says,
14 Kory Lee Devenish who is now deceased was working as a
15 partner with me. Never said it was a partnership, in my
16 construction business, didn't say our construction
17 business. Under authority of my contractor's license. So
18 in point of fact, he may have used the term he was working
19 as a partner, but these are not only brothers, these are
20 twin brothers. But in point of fact, he's saying this is
21 my construction business, my contractor's license. He
22 contracted for and on behalf of Kelly W. Devenish
23 Construction, which is the name of his sole proprietorship.
24 And, yeah, in fact, he may have been doing something
25 illegal by letting his twin brother work under his license.

1 The point I'm trying to get across to the board is the fact
2 that the contractor did something illegal does not destroy
3 the claim.

4 We supplied materials to Kory, they were
5 qualified services; the Diazes have a contract with Kelly
6 W. Devenish Construction. Now, this contract, it's
7 ambiguous, no question. It just says Devenish, it doesn't
8 say Kelly and Kory, we don't really know what it says. All
9 we have is Kelly's affidavit saying it was my business, my
10 license, my twin brother was contracting for me.

11 MR. CANTWELL: That affidavit was made after the
12 fact in an effort to conform so that it would conform to
13 the rules of the Fund; is that correct?

14 MR. JAUSSEI: No question that's correct. But,
15 again, Kelly, has declared bankruptcy, and on his
16 bankruptcy he named all of this as part of the debts that
17 he owed. So that predates the lawsuit, it predates, you
18 know, it goes clear back to the beginning of this thing.
19 There's no question that Kelly is not in here trying to
20 bend the rules. He accepted responsibility for this.

21 Again, I'll ask the board to take judicial notice
22 of that bankruptcy filing. And I happen to have those
23 exhibits here. We could put them as evidence if you want.
24 But the fact is Kelly is saying, look, my twin brother, my
25 deceased brother was contracting for me, in my contracting

1 business, under my license, and I was the one who was
2 letting him do this work. That may have been illegal, but
3 the legality of it doesn't destroy the claim.

4 MR. CANTWELL: If he had a contract with someone
5 who wasn't a contractor, that does destroy the claim;
6 doesn't it?

7 MR. JAUSSEI: That's true, but that's what I'm
8 really saying, is that contract is with Kelly W. Devenish
9 Construction, that's what Kelly Devenish is saying.

10 MR. CANTWELL: But Kelly Devenish is saying that
11 after the fact of his bankruptcy, and it doesn't cost him a
12 thing to say it.

13 MR. JAUSSEI: No question, he's bankrupt; no
14 question he's given up his license.

15 MR. CANTWELL: That's all. Thanks, Your Honor.

16 THE COURT: Other questions by the board? Mr.
17 Techmeyer?

18 MR. TECHMEYER: No.

19 THE COURT: Mr. Bankhead?

20 MR. BANKHEAD: Just to reiterate to make sure I
21 understand what you've just stated, Mr. Jaussi. You stated
22 that prior to signing this affidavit and as a condition of
23 his bankruptcy before all of this issue of, what do we need
24 to do to get this claim valid for the board to review,
25 you're saying that Mr. Kelly Devenish, who had the

1 contractor's license, did list this debt to Anderson Lumber
2 on his schedule in the bankruptcy?

3 MR. JAUSSEI: That is correct.

4 MR. BANKHEAD: Thereby acknowledging that it was
5 a legitimate part of his responsibility as a contractor
6 before any of this other stuff came up; is that correct?

7 MR. JAUSSEI: That's true, and I have those
8 schedules here.

9 THE COURT: Any intention of offering them into
10 evidence?

11 MR. JAUSSEI: I believe at this point I will.

12 MR. PATTERSON: That's fine, no objection.

13 MR. CANTWELL: Mr. Jaussi, I have another
14 question. I'm not used to doing things in order.

15 THE COURT: That's fine.

16 MR. CANTWELL: He -- now I forgot my question,
17 but if he did that, it wouldn't be a natural thing if he
18 was taking out bankruptcy to list any possible debts that
19 he might be involved in. These brothers, his brother might
20 have just said, hey, I think I want to build a house, is
21 that okay, can I do that under -- yeah, go ahead, and then
22 just do it, we wouldn't know the difference; would we?

23 MR. JAUSSEI: Well, I -- I suppose not. Again,
24 like I say, the problem we've got is they're not only
25 brothers, they're twin brothers. They probably did

1 everything together. I have no idea.

2 The only point I was making, and, again, this is
3 a technical, legal argument in this statute, and that is
4 assuming a hypothetical, if a homeowner contracts with
5 Layton Construction, and Layton Construction hires an
6 unlicensed framer to build on that house, and then Anderson
7 Lumber supplies that unlicensed framer, there's no question
8 Layton Construction, no matter how big they are, has broken
9 the law, because they've hired an unlicensed contractor.
10 There's no question they could be called in and fined and
11 whatever happens to contractors when they do that. But the
12 fact that Anderson Lumber was supplying materials to the
13 project, isn't destroyed. That's all I was saying in this
14 one.

15 If, in fact, Kelly and Kory, who are twin
16 brothers, who probably don't even have a clue because
17 they're doing everything together anyway, don't have a clue
18 that technically he's in violation being he hasn't filled
19 out some kind of affidavit saying this man is my employee,
20 my twin brother is my employee. If in fact he's in
21 technical violation, then the Division can do whatever they
22 need to do to pull his license, to fine him, to whatever,
23 because he's violated the law. But Anderson Lumber who is
24 out here supplying to Kory, has no idea that that's going
25 on, they're just simply supplying lumber to Kory, Kory's

1 building the house. And so what I'm saying is, it's their
2 illegal activity if it is, and it probably is, shouldn't be
3 punishment to the supplier.

4 MR. CANTWELL: It seems the difference to me in
5 that case you cite is, in the first case, it's definitely a
6 qualified contractor who has a license that made the
7 contract. In this case we're not sure of that.

8 MR. JAUSSEI: That is the question. That's the
9 nut, you've hit it right on the head. And that is, is this
10 contract which says Devenish, okay, and which is, in fact,
11 signed by Kory, considered in connection with this
12 affidavit where Kelly is saying, my twin brother Kory had
13 authority to contract for me, that's my contract; that's
14 the evidence. May I approach, Your Honor?

15 THE COURT: Yes.

16 MR. JAUSSEI: We'll have this marked Exhibit No.
17 23.

18 THE COURT: Any objections, Mr. Patterson?

19 MR. PATTERSON: None, Your Honor.

20 MR. JAUSSEI: I do have one extra copy, I can
21 present it to the board.

22 THE COURT: You can give it to the board, and it
23 will be received, the bankruptcy filing on the Chapter 7
24 proceeding.

25 MR. JAUSSEI: That's it. I don't think we have

1 anything more, Your Honor.

2 THE COURT: Mr. Patterson, anything else you'd
3 like to offer?

4 MR. PATTERSON: Yes, I'd like to respond and
5 clarify a couple of points. The first one being, is that
6 if you recall from the -- Your Honor, perhaps, first of
7 all, it would be appropriate to address the question that
8 the board had earlier.

9 THE COURT: Yes.

10 MR. PATTERSON: Mr. Bankhead had a question, if
11 we could have Mr. Webster explain it.

12 THE COURT: Go ahead.

13 MR. WEBSTER: My apologies. With recodification,
14 it was moved, and it took me a while to locate the
15 provision. If you'll refer to the Utah Construction Trades
16 Act, title 58, chapter 55, section 302, qualifications for
17 licensure, under part three, subpart I -- or H, sorry.
18 Nope that's alarm company. No, it's the same basic
19 provision, it applies to all of them. A contractor is
20 required to maintain with the Division evidence of
21 comprehensive general liability insurance in the form and
22 amount as established by rule by the Commission with
23 concurrence of the director, workers' compensation
24 insurance. Registration is required by applicable law with
25 the Division of Corporations and Commercial Code, Division

1 of Workforce Information and Payment Services, The State
2 Tax Commission and the Internal Revenue Service.

3 Therefore, if Kory was in fact an employee of
4 Kelly, Kelly was obligated to have notified the Division
5 that his affidavit of -- that he hired no employees was no
6 longer in force, and that he was now hiring employees. The
7 only way to have avoided such would be to have organized a
8 partnership or some other type of business entity where all
9 of the working individuals do not meet the Internal Revenue
10 Service definition of an employee.

11 THE COURT: Mr. Bankhead, any further questions
12 about that?

13 MR. BANKHEAD: Just a clarification. So if I
14 understand what you're saying, you're saying that there's a
15 rule that says that a contractor, a licensed contractor,
16 has to maintain workmen's comp?

17 MR. WEBSTER: That is law, yes.

18 MR. BANKHEAD: And so on. If they're working as
19 an individual they do not need that, but you then said that
20 if they do, they have to, what, notify you or send copies
21 of the workmen's comp, or what?

22 MR. WEBSTER: They are required to provide to the
23 Division a copy of the workers' compensation certificate of
24 insurance, a copy of their registration with unemployment,
25 a copy of their form 941, Internal Revenue form 941 showing

1 their federal ID number, and a copy of their form TC96
2 either Q or A, showing their state tax or their Utah state
3 withholding number.

4 MR. BANKHEAD: Thank you, that's all.

5 MR. JAUSSEI: I just have one question.

6 THE COURT: Go ahead.

7 MR. JAUSSEI: And perhaps it's, maybe I'm the only
8 one confused in this room, but I'm still trying to
9 understand the relevance of that to this issue. Would
10 someone frame that?

11 MR. PATTERSON: Mr. Jaussi, it was a response to
12 a question that Mr. Bankhead asked.

13 MR. JAUSSEI: Okay.

14 MR. PATTERSON: So it was his question, it was
15 just a response to that.

16 THE COURT: The claim may not rise or fall on
17 that issue, it's simply a response to the question.

18 MR. JAUSSEI: Okay.

19 THE COURT: Mr. Patterson, go ahead.

20 MR. PATTERSON: Thank you, Your Honor. I would
21 like to express appreciation to the board members and Mr.
22 Jorge for indulging us. We appreciate your time today. We
23 know that you're a volunteer board and this is taking time
24 out of your private life, so we are grateful for your
25 service to the community.

1 I also believe that the issue is quite simple,
2 but I think that there's an attempt to take you down the
3 wrong path. And so I'd like to back up and refer back to
4 the code that we're obligated to follow and refer to that.
5 In 38-11-203 in paragraph 1AC -- or excuse me, AB, it
6 requires the claimant before they receive payment from the
7 Fund, that they comply with all of the requirements of
8 section 38-11-204. The requirements of section 38-11-204,
9 as you go through those, you'll notice that one of them is
10 that they have entered a licensed contract -- or excuse me,
11 have entered into a written contract with a licensed
12 contractor. So in order for a claimant to be successful
13 with a Fund, the claimant first does have to establish that
14 the homeowner is entitled to protection under the act.
15 Because if the homeowner is not entitled to protection, if
16 they don't fall within that category that the legislature
17 intended to protect, then the mechanic's lien still stands
18 against the homeowner, and the mechanic's lien should be
19 enforced.

20 And it's the Division's position that's exactly
21 what should have happened in this case because a
22 partnership entered into a contract with a homeowner. The
23 homeowner, looking at the contract, looked to the top and
24 saw Kelly and Kory and one company. The natural inference
25 from that would be it was a partnership. Now, what other

1 evidence is there to establish that this was a partnership
2 liability? We have the bankruptcy filing, and the debt to
3 Anderson was listed as part of the debt in the bankruptcy.
4 So therefore, Kelly thought that this was a partnership
5 debt, that it was part of the obligation that he owed.

6 Also, we have the affidavit. And I would like to
7 read all of the words in that affidavit. Again, I'm on
8 page two of Exhibit 14. What it states at the beginning of
9 paragraph three, "At all times from November of 1997
10 through the middle of December 2000, my brother Kory Lee
11 Devenish, who is now deceased, was working as a partner
12 with me in my construction business under the authority of
13 my contractor's license.

14 Now, let's look at the word, working as a
15 partner. That doesn't say employee. I don't see how you
16 can change the word partner to employee in this affidavit.
17 It seems quite clear to me it says partner, and a partner
18 owns the partnership. And so obviously it would be his
19 partnership, obviously. And so this language that's been
20 referred to in the affidavit, I see it as a clear
21 representation by Mr. Kelly Devenish, that Kory was his
22 partner working with him. Again, reflecting that it was a
23 partnership and not as an employee.

24 We have the findings which the Court entered
25 into, which are binding upon Anderson Lumber, which are

1 binding upon the homeowner, which are binding upon the
2 estate of Kory Devenish and his wife Tina. And in there,
3 the judge said it was a partnership. Now, that's what
4 those parties are bound to. The Division was not a party
5 to that action. And I think we need to keep in mind that
6 the requirements of the law, is that every business entity
7 must be licensed before they can practice law in the state
8 of Utah.

9 In your packet that you have, you have the rules,
10 and I'd like to, first of all, refer you to the
11 administrative code, rule 156-55A-311. It says, "A
12 reorganization of the business organization or entity under
13 which a licensed contractor is licensed, shall require
14 application for a new license under the new form of
15 organization or business structure. The creation of a new
16 legal entity constitutes a reorganization, and includes a
17 change to a new entity under this same form of business
18 entity or a change of the form of business entity," and
19 listen to this, "between proprietorship, partnership,
20 whether limited or general joint venture corporation or any
21 other business form."

22 So if an individual under the licensing laws in
23 the state of Utah is going to convert their sole
24 proprietorship to a partnership, they first of all have to
25 become registered with the Division of Corporations; we

1 know that did not happen in this case. The next thing that
2 they have to do to become licensed is they have to file an
3 application, a new application with the Division of
4 Occupational and Professional Licensing; that never
5 happened in this case. The partnership was unlicensed.
6 Therefore, with the contract being made with the
7 partnership, the partnership being unlicensed, the
8 homeowner has not satisfied the statutory requirements
9 necessary for them to receive the protection under the act.
10 And because the homeowner, listen, the homeowner is not
11 entitled to the protection of the act, then the claimant is
12 not entitled to payment under the Fund. Why? Because
13 that's what 38-11-203 requires, because all of the elements
14 of 204 have to be met.

15 Now, we're not, it's not an issue you know if the
16 Division should have gone out and issued a citation to
17 Kelly Devenish here, that's not the issue. The issue we're
18 looking at is there are a set number of requirements that a
19 claimant must meet to be entitled to payment from the Fund.
20 And it's the Division's strong belief that these elements
21 have not been satisfied. They have not been satisfied
22 because the partnership was never sued. And we know from
23 case law that in order to sue a partnership, you have to
24 name the partnership. And when you serve that lawsuit upon
25 one of the partners, you have to identify them as an agent

1 of that partnership, and usually you want to sue them
2 individually as well too. That did not happen in this
3 case.

4 Kelly Devenish was not sued within one year.
5 And, in fact, there's never been a claim filed against
6 Kelly Devenish. The application in this matter was filed
7 against Kory Devenish doing business as Devenish
8 Construction. Kelly Devenish is not mentioned. This claim
9 is not against Kelly Devenish. The claim was against Kory
10 Devenish. When notice went out, it had to have gone out to
11 the wife of Kory Devenish, because Kelly Devenish was not a
12 party.

13 We believe that with the evidence on the tape,
14 that it was apparent to Anderson Lumber at the hearing that
15 there was an issue. Remember the language that was used is
16 that, did not see the nexus not as far as I could see. The
17 judge had that same issue. The judge wanted to make that
18 connection. That connection was given to the judge with
19 the affidavit. But the problem that we have, and I hope
20 that you picked that up on the tape, is that on at least
21 two occasions, the incorrect law was stated in that
22 hearing, once by Anderson and once by the judge. And
23 everyone seemed to agree to it. And that is that, oh,
24 yeah, you know, someone can work under someone else's
25 license. Well, we all know that you can't lend out a

1 license, that is improper.

2 Referring back to the rules, in, excuse me, the
3 code 58-55-501, it is unlawful in the state of Utah, in
4 paragraph 11, doing business under a name other than the
5 name appearing on the license. And that's the Division's
6 whole point, is the name appearing on the license is a sole
7 proprietorship, Kelly W. Devenish. Kelly W. Devenish as a
8 sole proprietor did not enter into a contract. He had his
9 partner as he explained it in his affidavit to the Court,
10 relied upon by the Court and the other parties, that was
11 his partner. His partner signed the contract, it was his
12 obligation. He listed the debt in the bankruptcy because,
13 yeah, he was a partner in that partnership.

14 We would simply request that the board not be
15 confused, that it would just simply look at the
16 requirements; have the requirements been met? If Kory
17 Devenish is the entity that entered the contract, obviously
18 he was not licensed. Obviously he could not operate under
19 his brother's license. The only argument would be
20 partnership, that's what was argued, that's what the Court
21 bought upon, that's what all the parties relied upon. And
22 the Division, applying the state statutory law, which
23 governs, rules and regulations, and everything else, it
24 states that they have to do the business in the name of the
25 licensee. And that was not done because we have the

1 partnership. All the facts that we have in the packet
2 indicate it was a partnership, and the Division
3 respectfully requests that this claim be denied, because
4 the homeowner is not entitled to the protection and the
5 claimant, therefore, is not entitled to payment under the
6 Fund. Thank you.

7 THE COURT: Mr. Jaussi, a final reply. Mr.
8 Bankhead, you have a question?

9 MR. BANKHEAD: I wonder if I could ask a question
10 of Mr. Patterson?

11 THE COURT: Go ahead.

12 MR. BANKHEAD: Mr. Patterson, I would like to go
13 back to the word "partner" in Exhibit 14 for a moment. I
14 would think that the word "partner" could be used in a
15 number of contexts. Certainly one of them is legal.
16 Others would not be, for example, Westec Electric, which is
17 a company in which I am a principal, is an S-corporation.
18 And I hold 50 percent of the shares and Wade Stevens holds
19 50 percent of the shares. On my business card, I have
20 Steven Bankhead, partner, and Wade Stevens, partner, that
21 technically is incorrect, this is not a partnership, we
22 just work as partners in an S-corporation. Paragraph four
23 hasn't been referred to, and I would just like to ask you
24 to respond to that. If we were going to follow Mr.
25 Jaussi's argument and say these are twin brothers, they're

1 working together, they're talking to themselves as
2 partners, but we assume that paragraph four should also be
3 reviewed here, it says, trying to define what they mean in
4 paragraph three, more specifically in August 2000, Kory
5 contracted for and in behalf of Kelly W. Devenish
6 Construction for this work.

7 So in trying, if we can assume that paragraph
8 four defines more completely what the word partner is, we
9 could -- it would seem to me that we could argue, or at
10 least reason that what they meant by the word partner
11 wasn't technical partner in the legal definition, but as I
12 use it in my, quote, partner in an S-corp., they're working
13 together. But I think it's clear from Mr. Kelly Devenish's
14 affidavit that he understood that the work was being done
15 under his contractor's license, and you indicated that he
16 wasn't a party to this, but he listed it on his bankruptcy,
17 which again would appear to me to think that he, as an
18 individual licensed contractor, has assumed liability for
19 this debt. Would you just address those concerns quickly
20 please?

21 MR. PATTERSON: I would be happy to. First of
22 all in the packet, State's Exhibit No. 11 on the first
23 page, it indicates there that the correct name of the
24 judgment debtor is the estate of Kory Lee Devenish, Tina R.
25 Devenish. And then if you jump down, it refers to the

1 judgment debtor as a natural person. And as you go through
2 all of those documents, you'll notice that everything
3 that's referred to in that action was Kory as an individual
4 until, until what time? Until they had the hearing.

5 At the time of the hearing there was incorrect
6 law stated. In reliance upon that incorrect law, there
7 were discussions of partnership. Perhaps this is
8 partnership, but I haven't seen any evidence of it. So the
9 parties and the Court were looking for something of
10 partnership. And so what happened? They received an
11 affidavit. So the intent was to go out and to obtain an
12 affidavit that would help qualify this claim before the
13 Fund. I didn't see a sincere, genuine effort to pursue the
14 homeowner and to really hold the homeowner's feet against
15 the iron to make sure they have met their requirements.

16 In fact, one example of that in the hearing,
17 you'll notice that the only representation about the
18 homeowner and their obligation under the act was they asked
19 the contractor, Kory, if he was licensed. He represented,
20 yes. Well, that's not the standard that we have, is it.
21 The standard is, did, in fact, the homeowner enter into a
22 licensed contract -- or excuse me, a contract with a
23 licensed contractor. That's the obligation that the
24 homeowner has under the act. That was not brought up. So
25 therefore, there was no thorough analysis.

1 Now, back to the partnership. So after it was
2 brought up, it was discussed in the hearing, what happened?
3 The affidavit came in. The affidavit came in as partners.
4 Now, the State has other evidence to collaborate that
5 representation. It is not in the packet before you today.
6 It was common knowledge. If the Division -- or excuse me,
7 the board would like to hear from an employer that knew
8 both individuals firsthand, and would be able to represent
9 to that, the Division would be happy to get that witness
10 for you, but that is not before you at this time. And I
11 don't believe it's necessary, because I believe the
12 affidavit, we have to strain its reading to read it other
13 than a partner. A partner in my company. If he was an
14 employee or he was working for me, I believe that would be
15 the representation. Mr. Bankhead, in your example, you are
16 both co-owners of a company, of an S-corp., that's my
17 understanding; is that correct?

18 MR. BANKHEAD: (Nodded his head.)

19 MR. PATTERSON: With that, you view him as your
20 business partner, someone you do business with. You're
21 both owners of the S-corp. If he was, if your partner was
22 not your partner or co-owner, would you still refer to an
23 employee as an owner? I would never refer to any of my
24 employees as a partner or owner with me, unless they, in
25 fact, were a partner or, quote, owner of the business

1 entity.

2 THE COURT: Mr. Jaussi, a final reply?

3 MR. JAUSSEI: I'll try to be brief. You gentlemen
4 have got all the evidence in front of you, you can read the
5 affidavit. The English is the English, there's nothing
6 there that's indecipherable. You're going to have to
7 decide yourself what Kelly Devenish was going to do.

8 I wasn't going to bring this up, but Mr.
9 Patterson's comments really forced this from me. His
10 comment that he didn't see a sincere effort to hold the
11 homeowner's feet to the fire. I think it's uncalled for; I
12 think it's unfair. And I now have to tell you what really
13 has been a burr in my saddle for a long time, and that's
14 this: It is the rules of the Division that require,
15 require that the only thing they will accept as evidence of
16 a good claim is findings of fact and conclusions of law
17 that the homeowner is qualified and that there's a licensed
18 contract and so forth and so on. So it's the Division's
19 own rules that require us to go through this process. And
20 we have three different attorneys and a judge all out there
21 trying to decide what it is the Division means. That's
22 manifestly injustice.

23 Now, Mr. Patterson comes in here and says, we
24 have findings and conclusions, and everybody is bound by
25 them but us, and somebody made a mistake. There is the

1 real problem. And I resent this no sincere effort to hold
2 the homeowner's feet to the fire. The fact is, we're all
3 out there doing the very best we can to try to make up our
4 mind what the board is going to do in the future. That's
5 an impossible burden, that's why we're here. We struggled
6 through those hearings in front of that Court, the judge
7 struggles with the same thing trying to figure out what it
8 is the board is going to hold up as a standard. And that
9 whole process is required by the Division's only rules.

10 Now, frankly, I think I am sincere. I certainly
11 can tell you this, we're going to be a lot more hostile
12 toward a lot more homeowners from today forward because we
13 now have a new indication of what the Division is requiring
14 as a precursor to bringing a claim before the board.

15 Again, our point is simply this: We sold to Kory
16 Lee Devenish, an individual. We have no right to sue
17 Kelly, we have no contract with Kelly, our contract is with
18 Kory. So there we are, stuck with Kory and his wife.
19 Actually it was his ex-wife, they had been separated for
20 two years, she hadn't been involved. As we get the case
21 started, as we get the homeowners involved, as we sue them,
22 as their attorneys answer, then we start going through,
23 trying to find the evidence, where is the contract. Of
24 course, whether or not they had contracted with a licensed
25 contractor comes way down the road. You can't find that

1 out before you sue them. You can't find that out before
2 they get an attorney and file an answer. That's when this
3 whole nexus comes up. We find out that, when we finally do
4 get the contract, that it says Devenish, it's ambiguous.
5 We examine it at length on the record, you saw the record.
6 You saw everybody trying to figure out what in the world
7 was going on and whether this claim would qualify or not.
8 We got an affidavit from Kelly, and I think his affidavit
9 is clear as far as his intent. He's trying to take
10 responsibility for this.

11 And with that, we get our findings and
12 conclusions. We're now completely prejudiced, we have no
13 choice but to release that lien. And we still haven't had
14 an opportunity to file a claim. So we're prejudiced, we've
15 released the lien, we filed a claim, then we get into this
16 situation.

17 So I just want to make that editorial comment
18 simply because I needed to respond to the insincere
19 comment.

20 THE COURT: The board will take the matter under
21 advisement based upon the argument and evidence offered
22 today, and will address the legal issues presented and
23 submit a recommendation to the Division. Just to
24 reiterate, if the board recommends and the Division orders
25 that this claim is not legally barred, the Court will

1 contact respective counsel after the issuance of that
2 order, will coordinate a schedule for the subsequent
3 hearing to take testimony as may be necessary on the
4 underlying factual question. Conversely, if the board
5 recommends and the Division orders that the claim is
6 legally barred, that would conclude this proceeding. We're
7 adjourned. Thank you.

8 MR. JAUSSI: Thank you, Your Honor.

9 MR. PATTERSON: Thank you.

10 (Concluded at 11:35 a.m.)
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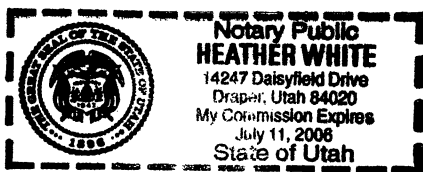
1 STATE OF UTAH)
 2) SS.
 3 COUNTY OF SALT LAKE)
 4

5 I, HEATHER WHITE, Registered Professional
 6 Reporter and Notary Public in and for the State of Utah, do
 7 hereby certify:

8 That said hearing was taken down by me in
 9 shorthand on August 14, 2002, at the place therein named
 10 and thereafter pages 3 through 42 were reduced to
 11 transcription under my direction.

12 I further certify that I am not of kin or
 13 otherwise associated with any of the parties to said cause
 14 of action and that I am not interested in the outcome
 15 thereof.

16 WITNESS MY HAND AND SEAL this 2nd day of
 17 January, 2003.



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35

HEATHER WHITE, RPR/CSR
 Notary Public
 Residing in Salt Lake County

My Commission Expires:
 July 11, 2006

In The Matter Of:

*Recovery Fund Claim
Anderson Lumber Co.*

*Hearing
August 14, 2002*

*Rocky Mountain Reporting Service, Inc.
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BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL
LICENSING OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN)

RECOVERY FUND CLAIM OF) Hearing August 14, 2002

ANDERSON LUMBER COMPANY)

REGARDING THE CONSTRUCTION)

BY KORY LEE DEVENISH DBA) Claim No.: LRF-2002-0226-01

DEVENISH CONSTRUCTION ON)

THE RESIDENCE OF FRUCTUOSO)

& MIRTA DIAZ 335 WOODLAND)

HILLS DRIVE, WOODLAND)

HILLS, UT., 84653)

Be it remembered that on the 14th day of August,
2002, the hearing in the above-named action now pending in
the above-named court, was taken before Heather White, a
certified shorthand reporter and notary public in and for
the State of Utah, commencing at the hour of 10:07 a.m. of
said day at the Heber M. Wells Building, 160 East 300
South, Fourth Floor, Salt Lake City, Salt Lake County,
State of Utah.

HEATHER WHITE — ROCKY MOUNTAIN REPORTING SERVICES

Page 2

APPEARANCES

For The Claimant: Clair Jaussi, Esq.

For The Division: Tony R. Patterson, Esq.

RESIDENCE LIEN RECOVERY FUND BOARD

Clint Techmeyer (Chair)

Steve Bankhead

Jorge Dennis

J. Clair Cantwell

Page 3

[1] WEDNESDAY, AUGUST 14, 2002

[2]

[3]

[4]

PROCEEDINGS

[5] **THE COURT:** This is the time and place set for
[6] hearing in the matter of the Lien Recovery Fund claim of
[7] Anderson Lumber Company regarding the construction by
Kory

[8] Lee Devenish doing business as Devenish Construction on the
[9] residence of Fructuoso and Mirta Diaz, 335 Woodland Hills
[10] Drive, Woodland Hills, Utah 84653. Case number
[11] LRF-2002-0226-01. This matter comes on hearing before the
[12] Residence Lien Recovery Fund advisory board. The claimant
[13] in this proceeding, Anderson Lumber, is represented by
[14] Counsel Clair Jaussi. The Lien Recovery Fund is
[15] represented by Tony R. Patterson. There are four members
[16] of the advisory board present for the hearing today. The
[17] chair of the board, Clint Techmeyer, Steven Bankhead, Jorge
[18] Dennis, and James Clair Cantwell. And J. Craig Jackson,
[19] the director of the Division of Occupational and
[20] Professional Licensing is also present.

[21] Prior to commencement of the hearing, the Court
[22] has conducted a brief prehearing conference with respective
[23] counsel. Mr. Jaussi, do you have an opening statement?

[24] **MR. JAUSSEI:** Yes, I do, Your Honor. May I work
[25] from the seat?

[1] **THE COURT:** That's fine.

[2] **MR. JAUSSEI:** Thank you. Really today I don't
[3] think there's going to be very much in dispute factually.
[4] I think this is really a question of what is the law and
[5] how is the law going to be interpreted. And we have some
[6] very different approaches, I believe, from the Division in
[7] the way that the law should be interpreted.

[8] As I understand it, there are really two main
[9] issues that the Division has taken with this claim. The
[10] first, they've taken the position that the lawsuit wasn't
[11] commenced within 180 days of the last delivery of materials
[12] by Anderson Lumber Company. Perhaps I can characterize
[13] that. As I understand it, what they're really saying,
[14] because there's no question the lawsuit was commenced
[15] within 180 days of the last delivery, that is, the
[16] complaint was filed within 180 days of the last delivery of
[17] the Anderson Lumber materials, but the complaint was filed
[18] against Kory Lee Devenish and his wife Tina Devenish, and
[19] of course the homeowners, the Diazes.

[20] During the course of the hearings as this
[21] progressed, it became evident and apparent that Kory had a
[22] twin brother named Kelly, and that Kelly was the person who
[23] was licensed. And so Anderson Lumber, I think it was even
[24] after the judgment had been granted, attempted to amend the
[25] complaint and bring in Kory, the licensed contractor. The

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[1] problem is, Kory had declared bankruptcy like a year
[2] before. And so I think what the Division is saying is that
[3] the complaint against Kelly, the licensed contractor,
[4] wasn't commenced within the 180 days.

[5] Anderson Lumber's position is simply this, that's
[6] not a requirement of the law. The contract between
[7] Anderson Lumber and the person Anderson Lumber supplied the
[8] materials to is a contract between Anderson Lumber and
[9] Kelly, now deceased. We supplied the qualified services to
[10] Kelly Devenish, we got a judgment against the estate of
[11] Kelly Devenish, and against his widow. We brought her in
[12] on a supplemental order. There is no asset in the estate.
[13] We were unable to discover any assets, as an unemployed,
[14] stay-at-home widow who's basically got nothing worth
[15] taking. And that's the first issue.

[16] And, of course, the second issue is really the
[17] meat of this. And that is, did the homeowners enter into a
[18] written contract with a licensed contractor? Our position
[19] is that they simply did. Because if you'll look at the
[20] contract, it says Devenish Construction, and then you've
[21] got Kelly's and Kory's name underneath it. There's an
[22] affidavit, which is going to be presented to you, that
[23] Kelly signed saying, Kory had authority to contract for me.
[24] And this whole issue of, was it a partnership, was it not a
[25] partnership. The fact is, our position is that that

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[1] statement you indicated you didn't believe there was a
[2] great deal of any factual dispute as to this claim.
[3] Believing that to be the case based on your representation,
[4] are there any witnesses that you're going to offer today,
[5] or is it simply a matter of argument?

[6] **MR. JAUSSE:** For us it's simply a matter of
[7] argument, Your Honor. We do have one affidavit which is
[8] unsigned, and so I'm not going to try to enter that as
[9] evidence. But I'm going to ask Your Honor if you will hold
[10] the record open until we can obtain a notarized signed
[11] affidavit and then present that as a late filed exhibit.

[12] **THE COURT:** What is the purpose of it?

[13] **MR. JAUSSE:** It is another affidavit from Kelly
[14] Devenish, which basically refines his first affidavit. The
[15] salient point being that his twin brother, Kory, had full
[16] authority to contract for him.

[17] **THE COURT:** Mr. Patterson, I understand in our
[18] prehearing conference you explained that the Division would
[19] object to any receipt of the affidavit if not signed. If I
[20] were to grant a leave for ten days, to allow Mr. Jausse to
[21] obtain a signed affidavit, would the Division object to its
[22] receipt in this record?

[23] **MR. PATTERSON:** I would, Your Honor. I've not
[24] had an opportunity to review the affidavit. I believe that
[25] this is inconsistent with the first affidavit that was

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[1] **THE COURT:** You'll ask for a supplemental hearing
[2] to present him as a witness.

[3] **MR. JAUSSE:** That's correct, Your Honor.

[4] **THE COURT:** I guess the question I have for
[5] Counsel is this, before considering that request, if
[6] there's a threshold legal issue that needs to be addressed
[7] and can be addressed by the board without his testimony,
[8] can that proceed before a decision is made whether to have
[9] a supplemental hearing?

[10] **MR. JAUSSE:** I think it can, Your Honor.

[11] **THE COURT:** Mr. Patterson?

[12] **MR. PATTERSON:** Your Honor, I believe that if the
[13] evidence that was relied upon in the District Court was
[14] adequate for the parties at that time, it should be
[15] adequate for the claimant at this time. And so therefore,
[16] there would be no need to continue the hearing to question
[17] Mr. Devenish, unless he, in fact, is going to make
[18] statements which the Division believes are inconsistent.

[19] **THE COURT:** Mr. Jausse, if the threshold legal
[20] issue or issues can be submitted to the board today through
[21] argument of Counsel, and have the board address those
[22] issues, would it be appropriate then to let that proceed
[23] and then determine based on that outcome whether a
[24] supplemental hearing is necessary?

[25] **MR. JAUSSE:** I think it would be, Your Honor.

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[1] relied upon by the parties in the District Court. And
[2] without having Mr. Kelly Devenish here to testify and to
[3] explain the differences, that it would be inappropriate to
[4] have this affidavit admitted.

[5] **THE COURT:** If it's agreeable with Counsel, what
[6] I'll do under those circumstances is, still leave the
[7] record open for ten days, give counsel the opportunity to
[8] review the affidavit against the earlier one. If you still
[9] have an objection, I'll address the objection in a
[10] subsequent phone conference with Counsel. And if the
[11] objection is sustained, then the record will be closed; if
[12] the objection is overruled, then I will certainly expect
[13] Mr. Jausse to be able to submit the affidavit. Is that
[14] agreeable?

[15] **MR. PATTERSON:** Your Honor, the Division would
[16] object without having the opportunity to cross-examine Mr.
[17] Devenish based upon the representations in this affidavit.

[18] **MR. JAUSSE:** Your Honor, in that event, we would
[19] move to, in that event, we would move to continue this
[20] hearing so that we can subpoena Mr. Devenish and have him
[21] there.

[22] **THE COURT:** Any objection to the request for
[23] continuance, Mr. Patterson?

[24] **MR. JAUSSE:** Your Honor, may I clarify that I'm
[25] not moving to continue this hearing, I'm saying that —

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[1] **THE COURT:** We'll address it in that fashion, Mr.
[2] Patterson, if that's all right.

[3] **MR. PATTERSON:** Your Honor, I'm a little confused
[4] with that. Are we saying then we're going to leave open
[5] the hearing depending upon whether or not the claimant
[6] likes the outcome of the hearing today?

[7] **THE COURT:** No, what I'm indicating is, is that
[8] the parties will have the opportunity to present the legal
[9] argument to the board today. The board will deliberate
[10] that argument and make a recommendation based on the
[11] argument. If the board determines that there is a legal
[12] bar to this claim, with or without the testimony of Mr.
[13] Devenish, that will be the end of things as far as the
[14] board is concerned. There won't be a supplemental hearing.
[15] If the legal issue is resolved in favor of the claimant and
[16] it still requires further testimony from Mr. Devenish to
[17] establish the factual basis for the claim, then a
[18] supplemental hearing might be conducted. That's how I'm
[19] hearing this, Mr. Jausse, is that your intention?

[20] **MR. JAUSSE:** Yes, Your Honor.

[21] **THE COURT:** Mr. Patterson?

[22] **MR. PATTERSON:** So it's the board's decision?

[23] **THE COURT:** It's the board's decision whether
[24] this claim is barred as a matter of law. And if they
[25] determine it is barred as a matter of law and make a

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[1] any questions from the board. Mr. Bankhead.
[2] **MR. BANKHEAD:** Looking again at Exhibit 21, aside
[3] from the affidavit which was signed, is there any reason
[4] why we could not assume that Kory Devenish was acting as an
[5] employee or as an agent for Devenish, in this case Kelly
[6] Devenish, in the signing of this contract?
[7] **MR. PATTERSON:** The record submitted by Kelly
[8] Devenish to the Division reflects that he had no employees.
[9] That's attached to his license. When he's making the
[10] representation for the foreseeable future, he does not have
[11] any employees working under his sole proprietorship, Kelly
[12] Devenish Construction.
[13] **MR. BANKHEAD:** Would he necessarily have to
[14] change that affidavit in order to hire an employee?
[15] **MR. WEBSTER:** Yes.
[16] **MR. BANKHEAD:** Let's assume that I take out a
[17] contractor's license and I think I'm just going to work by
[18] myself so I start working by myself and get busy and think,
[19] gosh, I need somebody to help me, so I invite somebody to
[20] come and work for me. Do I have to notify the Division and
[21] change my license?
[22] **MR. PATTERSON:** We're checking the rules on that
[23] right quick. Mr. Webster, the program coordinator for the
[24] Fund, it's his understanding that that is required by the
[25] rules. He's attempting to locate that rule now.

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[1] **MR. BANKHEAD:** That's my only question.
[2] **THE COURT:** Mr. Dennis, any questions?
[3] **MR. DENNIS:** No, sir.
[4] **THE COURT:** Mr. Cantwell.
[5] **MR. CANTWELL:** Kelly Devenish, he's the one who
[6] had the license, he had it as an individual?
[7] **MR. PATTERSON:** Correct.
[8] **MR. CANTWELL:** And apparently there was a
[9] corporation, where does that come into it?
[10] **MR. PATTERSON:** The corporation became licensed
[11] after the construction on this particular property. That
[12] was applied for by Kory Devenish. What happened is after
[13] the, the brothers were doing this part-time company, they
[14] had this partnership, they had a falling out, they went
[15] their own ways. And Kory Devenish attempted to go out on
[16] his own. He received a license, which is in the packet,
[17] for the corporation. But that was not until months after
[18] the work on the project had stopped.
[19] **MR. CANTWELL:** So this was just an apparent
[20] partnership, this was not a formalized partnership?
[21] **MR. PATTERSON:** Part of the record that you have
[22] received reflects that the Division of Corporations has no
[23] record of the partnership being registered with the
[24] Division of Corporations. However, based upon, again, the
[25] representations, the affidavit, the practice, the

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[1] understanding of other individuals, that it was a
[2] partnership.
[3] **THE COURT:** Mr. Jaussi?
[4] **MR. JAUSSE:** If I could just direct your
[5] attention to this Exhibit 14, paragraph two. I mean, the
[6] biggest problem here is going to be confusion. I mean,
[7] it's going to require some very fine thinking to sift
[8] through the arguments that we have here. Because I think
[9] it becomes very technical.
[10] Look at paragraph two, for instance. It's
[11] obvious Kelly W. Devenish is doing his best. He's
[12] screaming at the top of his lungs, this is my job, my
[13] responsibility, I take full responsibility. Look, he says,
[14] Kory Lee Devenish who is now deceased was working as a
[15] partner with me. Never said it was a partnership, in my
[16] construction business, didn't say our construction
[17] business. Under authority of my contractor's license. So
[18] in point of fact, he may have used the term he was working
[19] as a partner, but these are not only brothers, these are
[20] twin brothers. But in point of fact, he's saying this is
[21] my construction business, my contractor's license. He
[22] contracted for and on behalf of Kelly W. Devenish
[23] Construction, which is the name of his sole proprietorship.
[24] And, yeah, in fact, he may have been doing something
[25] illegal by letting his twin brother work under his license.

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[1] The point I'm trying to get across to the board is the fact
[2] that the contractor did something illegal does not destroy
[3] the claim.
[4] We supplied materials to Kory, they were
[5] qualified services; the Diazes have a contract with Kelly
[6] W. Devenish Construction. Now, this contract, it's
[7] ambiguous, no question. It just says Devenish, it doesn't
[8] say Kelly and Kory, we don't really know what it says. All
[9] we have is Kelly's affidavit saying it was my business, my
[10] license, my twin brother was contracting for me.
[11] **MR. CANTWELL:** That affidavit was made after the
[12] fact in an effort to conform so that it would conform to
[13] the rules of the Fund; is that correct?
[14] **MR. JAUSSE:** No question that's correct. But,
[15] again, Kelly, has declared bankruptcy, and on his
[16] bankruptcy he named all of this as part of the debts that
[17] he owed. So that predates the lawsuit, it predates, you
[18] know, it goes clear back to the beginning of this thing.
[19] There's no question that Kelly is not in here trying to
[20] bend the rules. He accepted responsibility for this.
[21] Again, I'll ask the board to take judicial notice
[22] of that bankruptcy filing. And I happen to have those
[23] exhibits here. We could put them as evidence if you want.
[24] But the fact is Kelly is saying, look, my twin brother, my
[25] deceased brother was contracting for me, in my contracting

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[1] anything more, Your Honor.
[2] **THE COURT:** Mr. Patterson, anything else you'd
[3] like to offer?
[4] **MR. PATTERSON:** Yes, I'd like to respond and
[5] clarify a couple of points. The first one being, is that
[6] if you recall from the — Your Honor, perhaps, first of
[7] all, it would be appropriate to address the question that
[8] the board had earlier.
[9] **THE COURT:** Yes.
[10] **MR. PATTERSON:** Mr. Bankhead had a question, if
[11] we could have Mr. Webster explain it.
[12] **THE COURT:** Go ahead.
[13] **MR. WEBSTER:** My apologies. With recodification,
[14] it was moved, and it took me a while to locate the
[15] provision. If you'll refer to the Utah Construction Trades
[16] Act, title 58, chapter 55, section 302, qualifications for
[17] licensure, under part three, subpart I — or H, sorry.
[18] Nope that's alarm company. No, it's the same basic
[19] provision, it applies to all of them. A contractor is
[20] required to maintain with the Division evidence of
[21] comprehensive general liability insurance in the form and
[22] amount as established by rule by the Commission with
[23] concurrence of the director, workers' compensation
[24] insurance. Registration is required by applicable law with
[25] the Division of Corporations and Commercial Code, Division

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[1] of Workforce Information and Payment Services, The State
[2] Tax Commission and the Internal Revenue Service.
[3] Therefore, if Kory was in fact an employee of
[4] Kelly, Kelly was obligated to have notified the Division
[5] that his affidavit of — that he hired no employees was no
[6] longer in force, and that he was now hiring employees. The
[7] only way to have avoided such would be to have organized a
[8] partnership or some other type of business entity where all
[9] of the working individuals do not meet the Internal Revenue
[10] Service definition of an employee.
[11] **THE COURT:** Mr. Bankhead, any further questions
[12] about that?
[13] **MR. BANKHEAD:** Just a clarification. So if I
[14] understand what you're saying, you're saying that there's a
[15] rule that says that a contractor, a licensed contractor,
[16] has to maintain workmen's comp?
[17] **MR. WEBSTER:** That is law, yes.
[18] **MR. BANKHEAD:** And so on. If they're working as
[19] an individual they do not need that, but you then said that
[20] if they do, they have to, what, notify you or send copies
[21] of the workmen's comp, or what?
[22] **MR. WEBSTER:** They are required to provide to the
[23] Division a copy of the workers' compensation certificate of
[24] insurance, a copy of their registration with unemployment,
[25] a copy of their form 941, Internal Revenue form 941 showing

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[1] their federal ID number, and a copy of their form TC96
[2] either Q or A, showing their state tax or their Utah state
[3] withholding number.
[4] **MR. BANKHEAD:** Thank you, that's all.
[5] **MR. JAUSSE:** I just have one question.
[6] **THE COURT:** Go ahead.
[7] **MR. JAUSSE:** And perhaps it's, maybe I'm the only
[8] one confused in this room, but I'm still trying to
[9] understand the relevance of that to this issue. Would
[10] someone frame that?
[11] **MR. PATTERSON:** Mr. Jaussi, it was a response to
[12] a question that Mr. Bankhead asked.
[13] **MR. JAUSSE:** Okay.
[14] **MR. PATTERSON:** So it was his question, it was
[15] just a response to that.
[16] **THE COURT:** The claim may not rise or fall on
[17] that issue, it's simply a response to the question.
[18] **MR. JAUSSE:** Okay.
[19] **THE COURT:** Mr. Patterson, go ahead.
[20] **MR. PATTERSON:** Thank you, Your Honor. I would
[21] like to express appreciation to the board members and Mr.
[22] Jorge for indulging us. We appreciate your time today. We
[23] know that you're a volunteer board and this is taking time
[24] out of your private life, so we are grateful for your
[25] service to the community.

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[1] I also believe that the issue is quite simple,
[2] but I think that there's an attempt to take you down the
[3] wrong path. And so I'd like to back up and refer back to
[4] the code that we're obligated to follow and refer to that.
[5] In 38-11-203 in paragraph 1AC — or excuse me, AB, it
[6] requires the claimant before they receive payment from the
[7] Fund, that they comply with all of the requirements of
[8] section 38-11-204. The requirements of section 38-11-204,
[9] as you go through those, you'll notice that one of them is
[10] that they have entered a licensed contract — or excuse me,
[11] have entered into a written contract with a licensed
[12] contractor. So in order for a claimant to be successful
[13] with a Fund, the claimant first does have to establish that
[14] the homeowner is entitled to protection under the act.
[15] Because if the homeowner is not entitled to protection, if
[16] they don't fall within that category that the legislature
[17] intended to protect, then the mechanic's lien still stands
[18] against the homeowner, and the mechanic's lien should be
[19] enforced.
[20] And it's the Division's position that's exactly
[21] what should have happened in this case because a
[22] partnership entered into a contract with a homeowner. The
[23] homeowner, looking at the contract, looked to the top and
[24] saw Kelly and Kory and one company. The natural inference
[25] from that would be it was a partnership. Now, what other

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[1] license, that is improper.

[2] Referring back to the rules, in, excuse me, the
[3] code 58-55-501, it is unlawful in the state of Utah, in
[4] paragraph 11, doing business under a name other than the
[5] name appearing on the license. And that's the Division's
[6] whole point, is the name appearing on the license is a sole
[7] proprietorship, Kelly W. Devenish. Kelly W. Devenish as a
[8] sole proprietor did not enter into a contract. He had his
[9] partner as he explained it in his affidavit to the Court,
[10] relied upon by the Court and the other parties, that was
[11] his partner. His partner signed the contract, it was his
[12] obligation. He listed the debt in the bankruptcy because,
[13] yeah, he was a partner in that partnership.

[14] We would simply request that the board not be
[15] confused, that it would just simply look at the
[16] requirements; have the requirements been met? If Kory
[17] Devenish is the entity that entered the contract, obviously
[18] he was not licensed. Obviously he could not operate under
[19] his brother's license. The only argument would be
[20] partnership, that's what was argued, that's what the Court
[21] bought upon, that's what all the parties relied upon. And
[22] the Division, applying the state statutory law, which
[23] governs, rules and regulations, and everything else, it
[24] states that they have to do the business in the name of the
[25] licensee. And that was not done because we have the

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[1] partnership. All the facts that we have in the packet
[2] indicate it was a partnership, and the Division
[3] respectfully requests that this claim be denied, because
[4] the homeowner is not entitled to the protection and the
[5] claimant, therefore, is not entitled to payment under the
[6] Fund. Thank you.

[7] **THE COURT:** Mr. Jaussi, a final reply. Mr.
[8] Bankhead, you have a question?

[9] **MR. BANKHEAD:** I wonder if I could ask a question
[10] of Mr. Patterson?

[11] **THE COURT:** Go ahead.

[12] **MR. BANKHEAD:** Mr. Patterson, I would like to go
[13] back to the word "partner" in Exhibit 14 for a moment. I
[14] would think that the word "partner" could be used in a
[15] number of contexts. Certainly one of them is legal.
[16] Others would not be, for example, Westec Electric, which is
[17] a company in which I am a principal, is an S-corporation.
[18] And I hold 50 percent of the shares and Wade Stevens holds
[19] 50 percent of the shares. On my business card, I have
[20] Steven Bankhead, partner, and Wade Stevens, partner, that
[21] technically is incorrect, this is not a partnership, we
[22] just work as partners in an S-corporation. Paragraph four
[23] hasn't been referred to, and I would just like to ask you
[24] to respond to that. If we were going to follow Mr.
[25] Jaussi's argument and say these are twin brothers, they're

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[1] working together, they're talking to themselves as
[2] partners, but we assume that paragraph four should also be
[3] reviewed here, it says, trying to define what they mean in
[4] paragraph three, more specifically in August 2000, Kory
[5] contracted for and in behalf of Kelly W. Devenish
[6] Construction for this work.

[7] So in trying, if we can assume that paragraph
[8] four defines more completely what the word partner is, we
[9] could — it would seem to me that we could argue, or at
[10] least reason that what they meant by the word partner
[11] wasn't technical partner in the legal definition, but as I
[12] use it in my, quote, partner in an S-corp., they're working
[13] together. But I think it's clear from Mr. Kelly Devenish's
[14] affidavit that he understood that the work was being done
[15] under his contractor's license, and you indicated that he
[16] wasn't a party to this, but he listed it on his bankruptcy,
[17] which again would appear to me to think that he, as an
[18] individual licensed contractor, has assumed liability for
[19] this debt. Would you just address those concerns quickly
[20] please?

[21] **MR. PATTERSON:** I would be happy to. First of
[22] all in the packet, State's Exhibit No. 11 on the first
[23] page, it indicates there that the correct name of the
[24] judgment debtor is the estate of Kory Lee Devenish, Tina R.
[25] Devenish. And then if you jump down, it refers to the

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[1] judgment debtor as a natural person. And as you go through
[2] all of those documents, you'll notice that everything
[3] that's referred to in that action was Kory as an individual
[4] until, until what time? Until they had the hearing.

[5] At the time of the hearing there was incorrect
[6] law stated. In reliance upon that incorrect law, there
[7] were discussions of partnership. Perhaps this is
[8] partnership, but I haven't seen any evidence of it. So the
[9] parties and the Court were looking for something of
[10] partnership. And so what happened? They received an
[11] affidavit. So the intent was to go out and to obtain an
[12] affidavit that would help qualify this claim before the
[13] Fund. I didn't see a sincere, genuine effort to pursue the
[14] homeowner and to really hold the homeowner's feet against
[15] the iron to make sure they have met their requirements.

[16] In fact, one example of that in the hearing,
[17] you'll notice that the only representation about the
[18] homeowner and their obligation under the act was they asked
[19] the contractor, Kory, if he was licensed. He represented,
[20] yes. Well, that's not the standard that we have, is it.
[21] The standard is, did, in fact, the homeowner enter into a
[22] licensed contract — or excuse me, a contract with a
[23] licensed contractor. That's the obligation that the
[24] homeowner has under the act. That was not brought up. So
[25] therefore, there was no thorough analysis.

[1] contact respective counsel after the issuance of that
[2] order, will coordinate a schedule for the subsequent
[3] hearing to take testimony as may be necessary on the
[4] underlying factual question. Conversely, if the board
[5] recommends and the Division orders that the claim is
[6] legally barred, that would conclude this proceeding. We're
[7] adjourned. Thank you.

[8] **MR. JAUSSE:** Thank you, Your Honor.

[9] **MR. PATTERSON:** Thank you.

[10] (Concluded at 11:35 a.m.)

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[1] STATE OF UTAH)
[2]) ss.
[3] COUNTY OF SALT LAKE)

[4] I, HEATHER WHITE, Registered Professional
Reporter and Notary Public in and for the State of Utah, do
[5] hereby certify:

[6] That said hearing was taken down by me in
[7] shorthand on August 14, 2002, at the place therein named
and thereafter pages 3 through 42 were reduced to
[8] transcription under my direction.

[9] I further certify that I am not of kin or
[10] otherwise associated with any of the parties to said cause
of action and that I am not interested in the outcome
[11] thereof.

[12] WITNESS MY HAND AND SEAL this 2nd day of
[13] December, 2003.

[14]
[15] HEATHER WHITE, RPR/CSR
Notary Public

[16] Residing in Salt Lake County

[17] My Commission Expires:
July 11, 2006

[18]

[19]

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words 30:7
work 3:24; 8:14; 15;
18:17; 20; 19:18; 20:25;
22:2; 33:24; 35:22; 36:6,
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workers 26:23; 27:23
Workforce 27:1
working 18:11; 18;
20:14; 18; 27:9; 18; 30:11;
14; 22; 36:1; 12; 38:14
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world 41:6
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33:4
years 40:20



Utah Department of Commerce
Division of Corporations & Commercial Code
160 East 300 South, 2nd Floor, S.M. Box 146705
Salt Lake City, UT 84114-6705
Phone: (801) 530-4849
Toll Free: (877) 526-3994 Utah Residents
Fax: (801) 530-6438
Web Site: <http://www.commerce.utah.gov>

Registration Number: N/A
Business Name: N/A
Registered Date: N/A

8/13/02

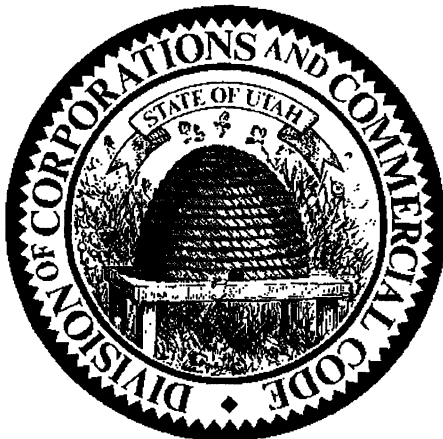
CERTIFICATE OF FACT

THE UTAH DIVISION OF CORPORATIONS AND COMMERCIAL CODE ("DIVISION") HEREBY CERTIFIES THAT THE FOLLOWING WERE NEVER PRINCIPALS ON FILE WITH ANY PARTNERSHIP PRESENTED FOR REGISTRATION IN THE STATE OF UTAH.

KELLY W. DEVENISH
KORY LEE DEVENISH

HOWEVER, KELLY W. DEVENISH IS LISTED AS SOLE PROPRIETOR OF KELLY (WIMMER) DEVENISH CONSTRUCTION, DBA #4898568-0151 – ACTIVE; KELLY W. DEVENISH IS LISTED AS SOLE PROPRIETOR OF KELLY W. DEVENISH CONSTRUCTION, DBA #2392897-0151 – EXPIRED; AND KORY DEVENISH IS LISTED AS PRINCIPLE OF DEVENISH CONSTRUCTION, INC., CORPORATION #4871256-0142 – EXPIRED

Kathy Berg



Kathy Berg
Director
Division of Corporations and Commercial Code

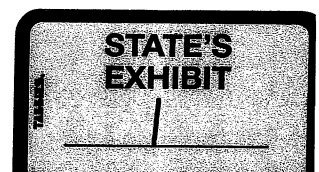
Dept. of Professional Licensing
(801)530-6628

Real Estate
(801)530-6747

Public Utilities
(801)530-6651

Securities
(801)530-6600

Consumer Protection
(801)530-6601





Utah Department of Commerce
Division of Corporations & Commercial Code
160 East 300 South, 2nd Floor, S.M. Box 146705
Salt Lake City, UT 84114-6705
Phone: (801) 530-4849
Toll Free: (877) 526-3994 Utah Residents
Fax: (801) 530-6438
Web Site: <http://www.commerce.utah.gov>

Registration Number: 4871256-0142
Business Name: DEVENISH CONSTRUCTION, INC.
Registered Date: JANUARY 22, 2001

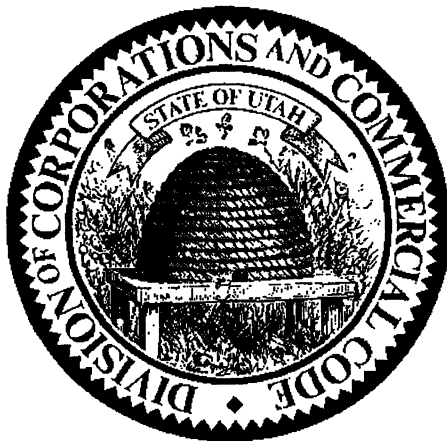
08/13/2002

CERTIFICATE OF EXPIRATION

THE UTAH DIVISION OF CORPORATIONS AND COMMERCIAL CODE ("DIVISION") HEREBY CERTIFIES THAT

DEVENISH CONSTRUCTION, INC.

FILED ARTICLES OF INCORPORATION WITH THIS OFFICE AND THAT THE ABOVE NAMED BUSINESS WAS EXPIRED ON APRIL 29, 2002, AS APPEARS OF RECORD IN THE OFFICE OF THE DIVISION.



Kathy Berg

Kathy Berg
Director
Division of Corporations and Commercial Code

Dept. of Professional Licensing
(801)530-6628

Real Estate
(801)530-6747

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State of Utah

DEPARTMENT OF COMMERCE
DIVISION OF OCCUPATIONAL & PROFESSIONAL LICENSING

Michael O. Leavitt
Governor

Ted Boyer
Executive Director

J. Craig Jackson
Division Director

Heber M Wells Building
180 East 300 South, P.O. Box 146741
Salt Lake City, Utah 84114-6741
(801) 530-8628 Fax: (801) 530-6511
Investigations Fax: (801) 530-6301
<http://www.commerce.state.ut.us/web/dopl/dopl1.htm>

Certificate of Custodian of Records

THIS IS TO CERTIFY that I have conducted a diligent search of all records maintained by the Utah Division of Occupational and Professional Licensing ("Division"), and the Residence Lien Recovery Fund, to determine whether a contractor license and a membership in the Lien Recovery Fund has ever been issued, and if so, the status of the license and membership.

I CERTIFY that Kelly W. Devenish d/b/a Kelly W. Devenish Construction license no. 349268-5501 was approved for licensure as a contractor on November 5, 1997 with Kelly W. Devenish acting as qualifier and said license expired on July 31, 2001.

I FURTHER CERTIFY that I am a public officer of the State of Utah by virtue of Title 58, Utah Code Annotated (1953), as amended, and that I am the custodian of all records pertaining to the Division and that if such records do exist anywhere they would be in my possession and control.

This certificate is made for use as court evidence or otherwise in compliance with Rule 44(a), Utah Rules of Civil Procedure.

IN WITNESS WHEREOF, I have attached my seal of office on this day Friday, October 19, 2001.



Kathie K. Schwab
KATHIE K. SCHWAB
Lien Recovery Fund Program Secretary

devenish

KELLY W. DEVENISH
KORY LEE DEVENISH

1160 E. 100. S.
~~PO BOX 77~~

SPRINGVILLE, UTAH 84663

PH: 801/489-6858 FAX: 801/489-9897

6532 100th
Springville
84663
464 2068

Bid Proposal

LICENSE NO.

DATE

8/20/00

JOB PHONE NO.

JOB NAME / NO.

MIRTA DIAZ

JOB LOCATION

WOODLAND HILLS UT

BID INCLUDES:

ROUGH FRAME LABOR

NAILS

CRANE SERVICE

\$8005.00

DOES NOT INCLUDE DEMOLITION.

LUMBER PACKAGE INCLUDES:

TRUSSES (ROOF)

TJI'S (FLOOR SYSTEM)

EXTERIOR STUDS

PLY WOOD

\$18,045.00

DOES NOT INCLUDE WINDOWS.

TOTAL \$26,050.00

Acceptance of Proposal: The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature

[Signature]

Date

Signature

Date

devenish

KELLY W. DEVENISH
KORY LEE DEVENISH

PO BOX 477
SPRINGVILLE, UTAH 84663
PH: 801/489-6858 FAX: 801/489-9897

Invoice

LICENSE NO. <u>MIRTA DIAZ</u>	
DATE <u>7/15/00</u>	JOB PHONE NO.
JOB NAME / NO. <u>MIRTA DIAZ</u>	
JOB LOCATION <u>CANDLAND HILLS, UT</u>	

MIRTA DIAZ 1" Draw For
FRAME LABOR AND MATERIAL

\$ 7500.00 LABOR

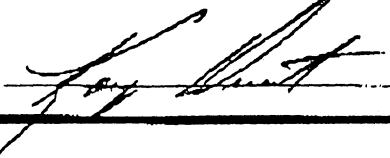
\$ 15,400.00 MATERIAL

TOTAL 22,900.00

WILL BILL FOR REMAINING
BALANCE AFTER UNITS
ARRIVE AND INSTALLED.
(INCLUDING DUES)

Acceptance of Proposal: The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

Signature



Date

7/15/00

Signature

Date

Claim Report

Formal Claim

Claim Number: LRF-2002-0226-01

July 1, 2002

Claim Examined by: W. Earl Webster

Claimant: Anderson Lumber Company

LRF Registration #: 314987

Registration Date: 11/01/199

Expiration Date:

Contractor License #:

Issue Date:

Expiration Date:

Claimant's Attorney: Clair Jaussi and/or Randy Christiansen

Nonpaying Party: Devenish Construction

Contractor License #

Original Contractor: Not Known

Type:

Contractor License #:

License Issuance Date:

License End Date:

See Detailed Analysis section of this report for explanation.

Homeowner: Fructoso & Mirta Diaz

Abstract and Recommendation

Division's recommended disposition: Deny

Claim presents a number of unresolved issues all arising from one problem. Claimant obtained judgment against Kory Lee Devenish. The judgment and most other claim documents show the Original Contractor was Devenish Construction--a partnership between Kory Lee Devenish and Kelly W. Devenish. Claimant did not bring action against the partnership nor did Claimant obtain judgment against the partnership.

Rule R156-49b-201(1)(e) provides:

The following adjudicative proceedings initiated by a request for agency action are classified as formal adjudicative proceedings . . . approval or denial of claims against the Residence Lien Recovery Fund created under Title 38, Chapter 11, in which the claimant is precluded from obtaining the required civil judgment or administrative order against the original contractor involved in the claim because the original contractor filed bankruptcy.

At present Claimant cannot obtain judgment against Devenish Construction because one partner (Kory) is dead and the other (Kelly) has filed a binding bankruptcy. Therefore, the Division is forced to treat this as a formal claim.

Note: because Devenish Construction was not named as a party to civil action it is not bound by the judgment. Consequently, the Division can only rely on the judgment for

determination of items not directly related to Devenish (i.e. Claimant's last date of qualified services). Division cannot rely on judgment for any item contestable by or directly related to Devenish (i.e. payment in full and licensure, respectively).

Based upon the existing claim documents, Division will stipulate that following claim elements have been proven:

1. Written contract between Homeowner and Original Contractor
2. Claim was timely filed with Division
3. Incident residence is owner-occupied
4. Claimant is a qualified beneficiary
5. Claimant provided qualified services for NPP as part of construction on the incident residence and has not received payment.

All other claim elements remain unresolved. The specific issues with each element are explained in the Detailed Analysis section of this report.

Detailed Analysis and Findings of Facts

Last date Claimant provided qualified services: 12/26/2000

Evidence in support of date: Judgment

Date Claimant file civil action or NPP filed bankruptcy:

Evidence in support of date:

Number of days difference:

According to the application, the claimant filed action against "The Estate of Kory Lee Devenish; Tina R. Devenish; Fructuoso Diaz; Mirta Diaz; and John Does 1 through 5" on December 26, 2000. However, as explained below, the nonpaying party appears to be a partnership known as Devenish Construction. The Division can find no evidence of the claimant filing suit against that partnership. Consequently, since the time to file action expired on June 24, 2001, it appears the claimant has missed the filing deadline and the Division, therefore, lacks jurisdiction to consider the merits of the claim.

Did Claimant obtain judgment against NPP? No

Date Claimant obtained judgment or NPP filed for bankruptcy

Evidence in support of date:

Because Claimant has not obtained judgment against Devenish Construction, the partnership, this deadline has not begun to run.

Note: if the entry date of the judgment against Kory Devenish is used as a starting point the claim is timely. Additionally, the claim is also timely if Kelly Devenish's bankruptcy filing date is considered the starting point for this deadline.

Is Claimant a qualified beneficiary? Yes

Did Homeowner enter into a written contract with Original Contractor for the performance of qualified services? Yes

Evidence of a written contract: Contract

Contract is between Homeowner and Devenish Construction. While not explicitly stated, Contract strongly infers that Devenish Construction is a partnership between Kelly & Kory Devenish.

Was Original Contractor Licensed on contract date? No (see comments)

An original contractor is defined as "a person who contracts with the owner of real property or the owner's agent to provide services, labor, or material for the construction of an owner-occupied residence." (Utah Code Ann. § 38-11-102(14)). The claim documents present two different entities that could meet this definition.

Most of the claim documents indicate the original contractor was a partnership known as Devenish Construction. The affidavit of Kelly Devenish states:

At all times from November. 1997, through the middle of December 2000, my brother Kory Lee Devenish, who is now deceased, was working as a partner with me in my construction business and under the authority of my contractor's license. As such, Kory was expressly authorized to contract for and in behalf of Kelly W. Devenish Construction. (emphasis added)

Additionally, the written contract appears to imply that Devenish Construction was a partnership.

Division records show Kelly W. Devenish Construction was issued license no. 349268-5501 on November 5, 1997, as a sole proprietorship. Utah Code Ann. § 58-55-301(1)(a) requires:

Any person engaged in the construction trades licensed under this chapter, as a contractor regulated under this chapter . . . shall become licensed under this chapter before engaging in that trade or contracting activity in this state unless specifically exempted from licensure under Section 58-1-307 or 58-55-305. (emphasis added)

Further, Utah Code Ann. § 58-55-102(22) defines a person as "a natural person, sole proprietorship, joint venture, corporation, limited liability company, association or organization of any kind." Finally, to ensure compliance with these requirements, Utah Administrative Code § R156-55a-301 provides:

A reorganization of the business organization or entity under which a licensed contractor is licensed shall require application for a new license under the new form of organization or business structure. The creation of a new legal entity constitutes a reorganization and includes a change to a new entity under the same form of business entity or a change of the

form of business entity **between proprietorship, partnership**, whether limited or general, joint venture, corporation or any other business form. (emphasis added)

Therefore, the partnership Devenish Construction was required to be licensed prior to entering into the contract with the homeowners. The Division has no record of ever licensing Devenish Construction as a partnership.

Alternatively, some of the claim documents could be construed that Kory Lee Devenish was the original contractor. Specifically, the credit application shows Kory Devenish as applying for credit as an individual, NOT as a representative of Devenish Construction, and as being employed by Kenny Thompson Construction. Moreover, the Notice of Intent to Hold and Claim Lien identifies the general contractor as Kory Lee Devenish.

Division records show that Kory Lee Devenish has never been licensed as a sole proprietor. However, Devenish Construction, Inc. – a Utah corporation – did become licensed, with Kory Lee Devenish acting as qualifier, March 19, 2001, or approximately nine months after the written contract was entered into.

Did Homeowner pay Original Contractor in full? Board review requested

Evidence of full payment: Judgment

Claimant forwards judgment finding of payment in full as adequate evidence. However, because Devenish Construction (the partnership) has not been a party to the proceedings it has not been afforded an opportunity to respond to the assertion that Homeowner paid in full. Therefore, Division is unable to accept judgment finding without corroborating evidence. To date, Division has not received such evidence.

Does residence qualify as "owner-occupied"? Yes

Evidence of Owner Occupancy: Judgment

Did Claimant provide qualified services? Yes

Evidence of qualified services: Judgment

Did NPP pay Claimant for qualified services? No

Evidence of nonpayment: Other (see comments)

Kelly Devenish's bankruptcy shows Anderson Lumber as an unsecured, nonpriority creditor. That bankruptcy was granted full discharge on June 8, 2001.

Kory Lee Devenish was killed in an OHV accident May 4, 2001. Judgment shows Kory's estate still owed money to Anderson Lumber at time of death.

Did Claimant exhaust collection remedies? No (see comments)

Claimant has obtained judgment against the Estate of Kory Lee Devenish and against Tina Devenish. Utah Code Ann. § 38-11-204(3)(d) requires "to recover from the fund, . . . the qualified beneficiary is not entitled to reimbursement from any other person." The

Division is unable to determine from the claim documents whether the claimant has attempted to collect from Tina Devenish.

Payment Checklist

	<u>Claimed</u>	<u>Approved</u>	<u>Difference*</u>
Qualified Services: \$	6,833.88	\$ 0.00	\$ -6,833.88
Pre-judgment Atty Fees:	1,800.00	0.00	-1,800.00
Pre-judgment Costs:	192.00	0.00	-192.00
Post-judgment Atty Fees:	0.00	0.00	0.00
Post-judgment Costs:	0.00	0.00	0.00
Interest:	956.76	0.00	-956.76
Totals \$	9,782.64	\$ 0.00	\$ -9,782.64

* Positive differences denote amounts approved in excess of amounts claimed; negative differences denote amounts denied.

Evidence of qualified services amount: Judgment

Per judgment qualified services = \$6,833.88. If claim is approved for payment, that amount should be paid.

Evidence of pre-judgment attorney fee amount: Judgment

Per judgment total attorney fees = \$1,800.00. R156-38-204d(3) limit for claim = \$1,704.87. If claim is approved for payment, Board will have to make recommendation as to appropriate amount of attorney fees.

Evidence of pre-judgment costs: Judgment

Per judgment total costs = \$192.00. If claim is approved for payment, that amount should be paid.

Evidence of post-judgment attorney fees:

Attorney fees limit per Utah Admin. Code R156-38-204d(3)(b): \$ 0.00

Explanation of post-judgment costs:

Explanation of interest:

Per Utah Code Ann. § 38-11-203(3)(c) interest calculated at 12% of qualified services from payment due date to claim approval date – net of delays attributable to the claimant.

As explained on the attached schedule, if claim is approved total interest would = \$1,352.54

Correspondence Summary

Claim Number: LRF-2002-0226-01

Anderson Lumber Company

v

Devenish Construction

Property: Diaz

Date Sent	Response Due	Response Received	Comments
03/29/2002	04/30/2002	04/17/2002	Reasons: 1. Have not exhausted all remedies - only sued on partner 04/08/02: Response received; Claimant requesting prolonged status to file suit against other partner. Request granted. Response due date extended indefinitely. 04/17/02: Claimant requested claim be reactivated
04/29/2002	05/29/2002		Claim converted to formal 05/29/02: Claimant did not contest conversion to formal claim. Processing claim forward.
05/30/2002	07/01/2002	06/27/2002	Reasons for conditional denial: 1. Original Contractor not known 2. Both possible Original Contractors were not licensed 3. Claimant may have claim against 3rd party 4. No proof of PIF by Homeowner 06/27/2002: Claimant requested claim be scheduled for formal hearing
07/01/2002	08/14/2002		07/01/02: Claim scheduled for formal hearing on Aug. 14, 2002. Notice of Intent to Oppose sent. Reasons for Intent to Oppose are same as reasons for Conditional Denial on May 30, 2002 plus 180-day jurisdiction issue.

Schedule of Interest

Terms of Sale: Per judgment
 Daily Interest Rate per UCA 38-11-203(3)(c) 0.0329%
 Total Interest Allowed per UCA 38-11-203(3)(c) \$ 1,352.54

<u>Event Date</u>	<u>Stop Interest?</u>	<u>Event Description</u>	<u>Changes to Qualified Service Balance</u>	<u>Qualified Service Balance</u>	<u>Number of Days Since Last Event</u>	<u>Interest Accrued Since Last Event</u>
11/03/2000	N	Payment due date per judgment	\$ 6,833.88	6,833.88	0	\$ -
03/29/2002	Y	First conditional denial	-	6,833.88	511	1,148.09
04/08/2002	Y	Claim prolonged	-	6,833.88	10	-
04/17/2002	N	Claim reactivated	-	6,833.88	9	-
05/30/2002	Y	Second conditional denial	-	6,833.88	43	96.61
06/27/2002	N	Claimant's response to conditional denial	-	6,833.88	28	-
08/14/2002	N	Board hearing	-	6,833.88	48	107.84

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN
RECOVERY FUND CLAIM OF
ANDERSON LUMBER COMPANY
REGARDING THE CONSTRUCTION BY
KORY LEE DEVENISH DBA
DEVENISH CONSTRUCTION
ON THE RESIDENCE OF
FRUCTUOSO & MIRTA DIAZ
335 WOODLAND HILLS DRIVE
WOODLAND HILLS, UTAH 84563

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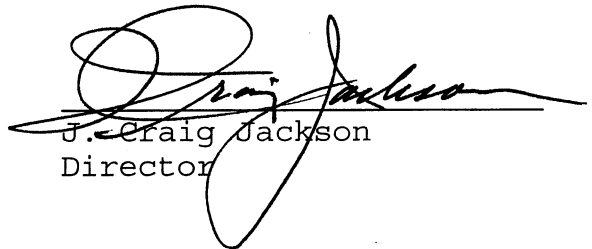
Claim No. LRF-2002-0226-01

The attached Findings of Fact, Conclusions of Law and Recommended Order are hereby adopted by the Director of the Division of Occupational and Professional Licensing of the State of Utah.

Dated this 10th day of January, 2003.



S E A


J. Craig Jackson
Director

Agency review of this Order may be obtained by filing a request for agency review with the Executive Director, Department of Commerce, within thirty (30) days after the date of this Order. The laws and rules governing agency review are found in Section 63-46b-12 of the Utah Code, and Section R151-46b-12 of the Utah Administrative Code.

BEFORE THE DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN	:	
RECOVERY FUND CLAIM OF	:	
ANDERSON LUMBER COMPANY	:	FINDINGS OF FACT
REGARDING THE CONSTRUCTION	:	CONCLUSIONS OF LAW
BY KORY LEE DEVENISH DBA	:	AND RECOMMENDED ORDER
DEVENISH CONSTRUCTION	:	
ON THE RESIDENCE OF	:	Claim No. LRF-2002-0226-01
FRUCTUOSO & MIRTA DIAZ	:	
335 WOODLAND HILLS DRIVE	:	
WOODLAND HILLS, UTAH 84563	:	
	:	

Appearances:

Clair J. Jaussi for Claimant

Tony R. Patterson for the Residence Lien Recovery Fund

BY THE BOARD:

An August 14, 2002 hearing was conducted in the above-entitled proceeding before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Residence Lien Recovery Fund Advisory Board. Board members present were Clint Techmeyer, Steven Bankhead, Jorge Dennis and James Clair Cantwell. The remaining Board members (Robert A. Burton, Roy F. Jensen and Allen Nielsen) were absent. J. Craig Jackson, Director of the Division of Occupational and Professional Licensing, was present.

Thereafter, evidence was offered and received. The Board now enters its Findings of Fact, Conclusions of Law and submits

the following Recommended Order for review and action by the Division:

FINDINGS OF FACT

1. Claimant Anderson Lumber Company provided qualified services relative to the construction of the residence of Fructuoso and Mirta Diaz. It is undisputed that, with one exception, Claimant has satisfied all requirements for possible recovery from the Fund relative to such qualified services.

2. Kelly W. Devenish, doing business as a sole proprietorship known as Kelly W. Devenish Construction, was so licensed as a B100 General Building Contractor on November 5, 1997. Kelly W. Devenish was the qualifier as to that license.

3. Kelly W. Devenish and Kory Lee Devenish are brothers, but they were never principals on file with any partnership registered with the Utah Division of Corporations and Commercial Code. Records maintained by that Division reflect Kelly W. Devenish was registered as the sole proprietor of Kelly (Wimmer) Devenish Construction.

4. Kory Lee Devenish submitted an August 20, 2000 bid proposal for services to be provided relative to the construction of the Diaz residence. The bid proposal references the name "Devenish" and lists both Kelly W. Devenish and Kory Lee Devenish. Kory Lee Devenish was working with Kelly W. Devenish in the latter's construction business, he was duly authorized to

act as an agent for Kelly W. Devenish Construction and he thus submitted the bid proposal to Fructuoso and Mirta Diaz.

5. Claimant filed an action in Fourth Judicial District Court to obtain a judgment for the value of building materials and supplies which Claimant provided to Kory Lee Devenish for the construction of the Diaz residence. Claimant - as the plaintiff in the Fourth Judicial District Court proceeding - filed a motion for summary judgment in that action. The motion was supported by an affidavit of Kelly W. Devenish.

6. That affidavit recites that Kory Lee Devenish was working as a partner with Kelly W. Devenish in the latter's construction business and under the authority of Kelly W. Devinsh's contractor's license. The affidavit recites Kory Devenish was expressly authorized to contract for and in behalf of Kelly W. Devenish Construction with Fructuoso and Mirta Diaz for construction work on their residence.

7. The trial court entered summary judgment for Anderson Lumber Company on February 8, 2002. The trial court entered findings of fact that Kelly W. Devenish Construction was a partnership between Kelly W. Devenish and Kory Lee Devenish and that the partnership operated under the authority of the contractor license with Kelly W. Devenish acting as qualifier for the license.

CONCLUSIONS OF LAW

Claimant contends Kory Lee Devenish had the authority to enter the contract for Kelly W. Devenish Construction. Claimant thus asserts there was a written contract between a licensed contractor (Kelly W. Devenish Construction) and the homeowners of the residence in question. Accordingly, Claimant asserts it has satisfied all requirements for possible recovery from the Fund.

The Fund contends the findings entered by the District Court in the related proceeding are not binding on the Division, inasmuch as neither the Fund nor the Division were a party to that action. The Fund asserts Kelly W. Devenish Construction was licensed as a sole proprietor with no employees, that license could not be loaned to any other entity and Kory Lee Devenish was not licensed as a contractor when he signed the written contract with the homeowners in question.

Based on the affidavit filed by Kelly W. Devenish in the Fourth Judicial District Court action, and in light of the findings entered by the Court in reliance on that affidavit, the Fund urges the partnership between Kory Lee Devenish and Kelly W. Devenish was never licensed to engage in the construction trades and that the contract was between that unlicensed partnership and the homeowners. Accordingly, the Fund asserts Claimant has failed to establish that it qualifies for recovery from the Fund.

Counsel for the Fund correctly asserts the Division and the

Fund are not bound by the findings entered in the related Fourth Judicial District Court action because neither the Division nor the Fund were a party in that proceeding. However, the Fund urges both Claimant and the homeowners are bound by the trial court's finding that there was a partnership between Kelly W. Devenish and Kory Lee Devenish.

The Board notes the trial court found that partnership operated under the authority of the contractor's license with Kelly W. Devenish as the qualifier for that license. The Board also notes the evidence offered in this proceeding clearly establishes that the contractor license in question was for a sole proprietorship, not a partnership.

Based on a review of the contract prepared and signed by Kory Lee Devenish, the recitals in the December 5, 2001 affidavit of Kelly W. Devenish with the reasonable inferences drawn therefrom, and since that the business entity of Kelly W. Devenish Construction was actually a sole proprietorship, the Board finds and concludes there was an unregistered partnership between Kory Lee Devenish and Kelly W. Devenish. The Board further finds and concludes Kory Lee Devenish was authorized by Kelly W. Devenish to act as an agent for Kelly W. Devenish Construction. The Board thus finds and concludes Kory Lee Devenish was duly authorized to enter the contract on behalf of Kelly W. Devenish Construction with the homeowners of the

residence in question.

Accordingly, the Board finds and concludes there was a written contract between a duly licensed entity (Kelly W. Devenish Construction) and the homeowners in question. The Board thus finds and concludes Claimant has satisfied all requirements for recovery from the Fund. The only remaining question is the amount of payment which should be duly made relative to this claim.

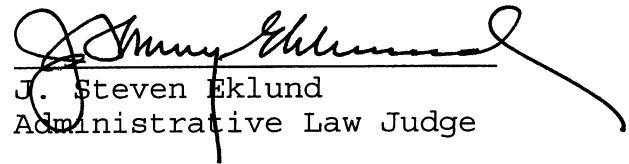
During the hearing in this proceeding, neither Claimant nor the Fund identified the amount to be paid if this claim were found warranted by the Board. Given the findings of fact and conclusions of law entered herein, the Board thus also concludes that the Claimant and the Fund should review and determine the amount payable for this claim and said payment should thus be authorized by the Division.

RECOMMENDED ORDER

WHEREFORE, IT IS ORDERED Claimant has satisfied all statutory requirements for recovery from the Fund relative to the claim under review.

It is further ordered that payment of the claim shall be made after the Claimant and the Fund have mutually determined the amount properly payable in this proceeding.

On behalf of the Residence Lien Recovery Fund Advisory Board, I hereby certify the foregoing Findings of Fact, Conclusions of Law and Recommended Order was submitted to J. Craig Jackson, Director of the Division of Occupational and Professional Licensing on the 10th day of January, 2003 for his review and action.


J. Steven Eklund
Administrative Law Judge

MAILING CERTIFICATE

I hereby certify that on the 14th day of January 2003, a true and correct copy of the foregoing *Order, Findings of Fact, Conclusions of Law, and Recommended Order* were sent first class mail, postage prepaid, to the following:

Brett Fergusen, Credit Manager Claimant
Anderson Lumber Company
PO Box 9549
Ogden, Utah 84409-9549

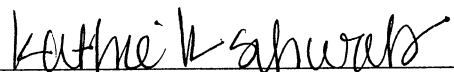
Randy J Christiansen Claimant's attorney
Clair J Jaussi
PO Box 2282
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Orem, Utah 84097-8102

Fructuoso & Mirta Diaz Homeowner
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AAG Tony R. Patterson Hand-delivered
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LRF Program Secretary

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BEFORE THE RESIDENCE LIEN RECOVERY FUND BOARD
DIVISION OF OCCUPATIONAL AND PROFESSIONAL LICENSING
DEPARTMENT OF COMMERCE OF THE STATE OF UTAH

IN THE MATTER OF THE LIEN	:	JOINT STIPULATION AND
RECOVERY FUND CLAIM OF	:	ORDER
ANDERSON LUMBER COMPANY	:	
REGARDING THE CONSTRUCTION BY :	:	
DEVENISH CONSTRUCTION	:	Claim No. LRF 2002-0226-01
ON THE RESIDENCE OF	:	
FRUCTUOSO & MIRTA DIAZ	:	

The Division of Occupational and Professional Licensing (hereinafter the Division), by and through its counsel, Tony R. Patterson, Assistant Attorney General, and Anderson Lumber Company, (hereinafter the Claimant), do hereby stipulate and agree as follows:

1. The Claimant admits the jurisdiction of the Division over the subject matter of this action.
2. Claimant enters into this Stipulation voluntarily, and other than what is contained in this agreement, no promise whatsoever has been made by the Division, or any member, officer, agent or representative of the Division to induce the signing of this Stipulation.

3. Claimant acknowledges the right to be represented by counsel, and has elected to be represented by Randy J. Christiansen and Clair J. Jaussi in this matter.

4. Claimant understands there is a right to a hearing before the Residence Lien Recovery Fund Advisory Board. It is hereby acknowledged that by executing this document, Claimant waives: (1) the right to a hearing, (2) the right to present evidence on the claim, (3) the right to present witnesses, (4) the right to a Notice of Agency Action, and (5) other available rights in connection with said hearing.

5. Claimant acknowledges that this Stipulation and Order, upon approval by the Director of the Division, shall be the final compromise and settlement of this matter. Claimant further acknowledges that the Director is not required to accept this Stipulation and Order and that if the Stipulation is not accepted, it is null and void; provided, however, that the Division and the Claimant waive any claim of bias or prejudgment which they might otherwise have with regard to the Director by virtue of the Director's having reviewed this stipulation, and this waiver shall survive any nullification.

6. The Division has reviewed the application and supporting evidence in this claim. It is the staff's conclusion, based upon the information and documentation submitted by Claimant, that Claimant was a qualified beneficiary during the construction on the residence, there is adequate money in the fund to pay the amount ordered, and that Claimant has complied with all requirements found in Utah Code Ann. §38-11-204.

7. The Claimant was precluded from obtaining a judgment against the Permissive Party, Devenish Construction, because that party filed for Bankruptcy in case number 01-22587, United States Bankruptcy Court, District of Utah.

8. The final Claim Report, contained in the Division's file, is incorporated by reference.

9. The Permissive Party was sent a notice by certified mail of their rights, responsibilities, and opportunity to respond. The Permissive Party has failed to respond within the thirty days allowed by R156-38-105(7).

10. That the amount of qualified services is \$6,833.88, the amount of costs are \$192.00, the amount of allowable interest is \$1,352.54, the amount of attorney fees \$1,704.87, for a total claim of \$10,083.29.

11. Claimant will accept the payment of \$10,083.29 as satisfaction of its claim with the fund.

12. Claimant understands the Division's right of subrogation as set forth in Utah Code Annotated §38-11-205. Upon payment from the Fund, the Claimant's claim against the Permissive Party shall be assigned to the Division. Claimant's judgment against the Permissive Party is automatically assigned to the Division. Claimant shall render the necessary assistance to the Division in its efforts to enforce the subrogation rights. Claimant will not fail to act or commit any act that may cause the assigned claim to be compromised. Further, Claimant will remit to the Division all funds received from any source, other than the Lien Recovery Fund, that were paid with the intention of reducing the underlying obligation of this claim.


13. Before negotiating the draft paying this claim, Claimant shall release any lien filed against the owner-occupied residence and hold the owner harmless for services or materials involved in this claim.


14. This document constitutes the entire agreement between the parties and supersedes and cancels any and all prior negotiations, representations, understandings or agreements between the parties. There are no verbal agreements which modify, interpret, construe or affect this Stipulation.

DATED this 13 day of February, 2003.


TONY R. PATTERSON
Assistant Attorney General

DATED this 11 day of February, 2003.

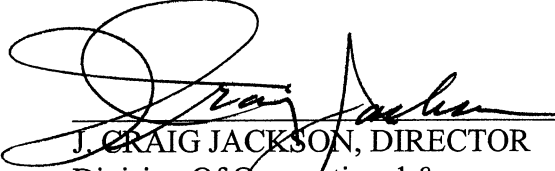

RANDY J. CHRISTIANSEN
CLAIR J. JAUSSE
Attorneys for Plaintiff


EARL WEBSTER
Approved

ORDER

The Stipulation above, hereby approved by the Director of the Division of Occupational & Professional Licensing, constitutes my Findings of Fact and Conclusions of Law in this matter. It is ordered that Anderson Lumber Company, claim number LRF 2002-0226-01 is payable from the Residence Lien Recovery Fund, and that Claimant be paid the amount of TEN THOUSAND EIGHTY-THREE DOLLARS AND TWENTY-NINE CENTS (\$10,083.29) as full satisfaction of the claim.

DATED this 18th day of February, 2003


J. CRAIG JACKSON, DIRECTOR
Division Of Occupational &
Professional Licensing

MAILING CERTIFICATE

I hereby certify that on the 10th day of February, 2003, a true and correct copy of the foregoing Order was sent first class mail, postage prepaid, to the following:

BRENT FERGUSON
ANDERSON LUMBER COMPANY
PO BOX 9459
OGDEN UT 84409-9459

Claimant

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Counsel for Claimant

KORY LEE DEVENISH
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Nonpaying Party

RON NOYES
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Counsel for Nonpaying Party

FRUCTUOSO & MIRTA DIAZ
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WOODLAND HILLS UT 84653

Homeowners

TONY R. PATTERSON
OFFICE OF THE ATTORNEY GENERAL
VIA HAND-DELIVERY

Counsel for the Division

Kathie Schwab
Kathie Schwab, Program Secretary